AN INQUIRY INTO THE MANNER OF CREATING PEERS.

——*Antiquam exquirite Matrem.*
VIRG.

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KINGSTON ONTARIO CANADA

THE Leaders of thoſe Warlike Nations who overturn'd the *Roman* Empire, did in proceſs of time become Kings of the reſpective Provinces which they Conquer'd: And by the Diſpoſition and Regulation of Property, which they reſpectively eſtabliſh'd among their Followers, gave Birth to what was afterwards call'd the *Feudal-Law*. For by the *Feudal-Law* muſt not be intended, thoſe Laws by which the *Goths* (or by whatſoever other Name the Glorious Founders of the *European* Monarchies were known) were govern'd while they were as yet in their own Countries, but thoſe which after the Acquiſition of their ſeveral Provinces, the Conquerors by a Common Neceſſity were oblig'd to obſerve, that they might be able to keep Poſſeſſion of their Conqueſts. And hence is it that the Form of their Civil Government, was taken from that of their Army. The Antient Inhabitants of the Countries Conquer'd, not being to be truſted with too large a Share of Property, the Diſtribution of Lands (which was the Reward of the Conquering Army) was made with a View to the keeping them in perpetual Subjection.

But without entring particularly into the Hiſtory of the Riſe and Progreſs of the *Feudal-Law*, it will be ſufficient to obſerve, that in a ſmall Compaſs of time, it ſpread over all *Europe*; the ſeveral Conquerors of the *European* Provinces, being engag'd by a likeneſs of Circumſtances,

cumſtances, to eſtabliſh Laws ſimilar to each other. And a Kingdom, upon their Principles, is to be conſider'd no otherwiſe than as one great Seignory or Dominion, of which the King is the Chief Lord. For the whole conquer'd Territory was at firſt divided into Two Parts: One of which was reſerv'd for the Support and Revenue of the Crown, and was manur'd by the proper Tenants and Husbandmen of the King. Which Share of the Lands was the *Sacrum Patrimonium Principis*, and the inſeparable Inheritance of the Crown, and is ſtyl'd in the Book of Domeſday, *Terra Regis*, and is now known in Law, by the Name of *Antient Demeſne*. The Occupyers of theſe Lands, were all Tenants in *Socage*, and (among other their Privileges) they cou'd not by Law be oblig'd to ſerve in the Wars.

Fitz-Herbert. Stat. de Militi. 1 Ed. 2. cap. 6.

For the Defence therefore of their new eſtabliſh'd Kingdoms, the other part of the Land was divided among the Military Men; in a Manner ſo like what was practis'd by *Alexander Severus* in ſome Frontier Provinces of the *Roman* Empire, that it has been thought by Men of very conſiderable Learning, to have been the Foundation of the *Feudal-Law*: The Barbarians making uſe of that Method, which they found employ'd by that Emperor for the defence of his Provinces, to maintain themſelves in the Poſſeſſion of theirs. As the Words of *Ælius Lampridius*, from whom this Paſſage is taken, are very remarkable, I have thought fit to tranſcribe them. "Sola quæ de Hoſtibus capta "ſunt Limitaneis Ducibus & Militibus donavit, ita "ut eorum ita eſſent, ſi Hæredes illorum militarent, "nec unquam ad Privatos pertinerent dicens attentiùs "eos militaturos, ſi etiam ſua Rura defenderent. For this Purpoſe therefore, Provinces were granted to *Dukes*, Sub-Diviſions of them, or Counties to *Earls*, Caſtles and Seignories to *Barons*; ſubject, among others, to this Condition, of ſerving in the Wars with a preſcribed Number of Men.

In vitâ Alexandri Severi.

Theſe *Fiefs*, as they were afterwards call'd, were Originally, at moſt but for Term of Life; and when in Proceſs of time they became Hereditary, this Condition of Military Service was ſo annex'd to the Poſſeſſion of Land, that every *Donee* and his Heirs were oblig'd, not *ex pacto vel conditto*, but of Common Right, without any expreſs Reſervation in the Grant for that

Purpoſe,

Purpose, to render all Feodal Duties and Services whatsoever.

This *Feudal Law* prevail'd so universally, that while the *Civil Law* was buried for several Ages and forgotten, it was, as it were, the *Jus Gentium* of *Europe*. As for *England* in particular, the *Civil Law* was scarcely ever admitted, whenas the Bulk of our *Common Law* is nothing but Feudal Customs. And *Bracton* thought, that *Counties* and *Baronies* were in a manner essential to the Being of a Kingdom; *Regnum*, says he, *quod ex Comitatibus & Baroniis dicitur esse constitutum*: And the Author of the *Mirror of Justices*, after mentioning several of the Royal Prerogatives, adds, "These "Rights the first Kings held, and of the Residue of "the Lands they did enfeoffe the *Earls*, *Barons*, "*Knights*, *Serjeants* and others, to hold of the King "by the Services provided and ordained for the De-"fence of the Realm, according to the Articles of "the Antient Kings." And for this Reason therefore do all our Lawyers affirm, that no Subject does possess any Land in *England* absolutely free, but that it is all held mediately or immediately of the Crown, it being but Partially or Conditionally, and not Absolutely granted to him.

Lib. 2. c. 34.

C. 1. ss. 3.

Co. Lit. ss. 1. Smith de Rep. l. 3. c. 10. Somner Gavel. p. 109, &c.

At the Time of the Conquest the *Feudal Law*, as it was understood and practis'd in *France*, flourish'd in its full Vigour in *Normandy*. Not that the Customs of *Normandy* were entirely the same with those of *France*, since that was impossible, each Province of that Kingdom, even at this Day having distinct and different Customaries, tho' all founded upon the same Principles, as appears by their greatest Lawyers, constantly explaining the Customs of one Province by those of another. But that (in like manner) *Rollo* upon his Conquest of *Neustria*, afterwards call'd *Normandy*, for the Preservation of his Acquisition, did establish Laws (as his Circumstances were the same) much resembling those which had been enacted by the *Franks*, upon their Conquest of *France*, which, as Intercourse and Commerce between the two People encreas'd, acquir'd a still greater Likeness. Now altho' there were Military Tenures in *England*, during the time of the *Saxons*, yet it is certain that they underwent a very great Alteration by the Accession of *William the Conqueror* to the Throne, who establish'd many Feudal

Oeuvres de Basnag. Vo. 1.

Cuſtoms for Law, that he brought with him from *Normandy*.

Fiefs had in *France*, not many Years before our Conqueſt, been made Hereditary with no other View than to ſecure the Succeſſion of the Crown to one Family. For *Hugh Capet*, who uſurped the Crown of *France*, to the entire Excluſion of the *Carolovingian* Line, in order to make it the Intereſt of all the leſſer Nobility (for perhaps ſome of the greater *Fiefs* had been made Hereditary ſooner thro' the Weakneſs of the *French* Princes) to ſupport his Title, did in the Year 988 grant to them, that from thenceforth they ſhould hold their *Fiefs* to them and their *Heirs* for ever, in a Feodal Manner by the Ceremony and Oath of *Homage* and *Fealty*. This Example was wiſely followed by *William* the Conqueror, who immediately transferr'd (if Sir *Harry Spelman* is to be believ'd) this *French* Cuſtom of making *Fiefs* Hereditary into *England*, neglecting the former Practice of our *Saxon* Anceſtors, who had till that time continued the Tenure of their *Fiefs* either Arbitrary, or at leaſt in ſome definite Limitation, as for Life, *&c.* But what makes this Speculation the more probable is, that for a long time after the Conqueſt, the Rules of the Deſcent of Land at the Common Law were very uncertain. Which is exactly conformable to what happened abroad, during the Infancy of the Feudal Law, in which the Succeſſion to Fiefs was but by ſlow Degrees reduc'd to a Certainty. " Antiquiſſimo tempore ſic erat in Do-
Lib. Feudor. 1. tit. 1. " minorum Poteſtate connexum, ut quando vellent, " poſſent auferre rem in feudum a ſe datam. Poſtea " vero eò ventum eſt, ut per annum tantum firmita- " rem haberent. Deinde ſtatutum eſt ut uſque ad " Vitam fidelis produceretur. ——— Sic progreſſum " eſt, ut ad filios deveniret. " My Lord Chief Juſtice *Hales* does obſerve out of *Glanvil*, that in the
De Succeſſion. Lib. 7 c. 3. Reign of *Henry* the Second, if a Man had two Sons and the Eldeſt dy'd in the Lifetime of the Father leaving a Son or Daughter and then the Father dy'd, it was controverted whether the Nephew or the Son ſhould ſucceed as Heir to the Father. The Chief Juſtice adds that the better Opinion ſeems to be for the Nephew; but then this Obſervation muſt be added, that tho' *Glanvil* does declare for the Nephew, it is not generally but upon Condition, for if the Father of

the Nephew had been by the Grandfather provided for with a ſufficient Portion, and been as it were manumitted and made *ſui Juris*, in ſuch Caſe the Nephew according to *Glanvil* was not Heir. But if the Father dy'd during the Life of the Grandfather while he was part of the Grandfather's Family, and *Sub ejus poteſtate*, without any ſeparate Eſtate of his own, in ſuch caſe only was the Nephew Heir. " Ita dico ſi Pater " ſuus non fuerit ab avo ſuo foris familiatus——— " ſi quando partem terræ ſuæ aſſignet Pater filio ſuo " & Seiſinam faciat, ———tunc enim non poterint " Hæredes ipſius filii de Corpore ſuo aliquid amplius " petere contra avunculum ſuum vel alium de reſiduâ " parte Hæreditatis avi ſui. But beſides what is now obſerved out of *Glanvil*, it is certain that much harder Caſes did happen at the time that he wrote. For ſometime by the *Feudal Law*, if the Father dy'd leaving ſeveral Sons, the Lord of the *Fief*, tho' he was oblig'd to give it one of them, was yet at Liberty to grant it to which he pleas'd. " Progreſſum eſt ut " ad Filios deveniret, in quem, ſcilicet Dominus hoc " vellet beneficium confirmare. Lib. Feud. ubi ſuprà.

That the King had a Prerogative ſomewhat like this in relation to Female Heirs is certain, for by *Fitz-Herbert* it appears, that if a *Baron* dy'd leaving only three Daughters, if the two Eldeſt were Married, *&c.* The King had the Marriage of the Youngeſt, to whoſe Husband the King cou'd grant the whole Inheritance of the Father, entirely excluding the other Siſters. But this was not all, for during the ſame Reign of *Henry* 2. a Man dy'd leaving a Son by a firſt Wife, and another Son by a ſecond Wife, the King claim'd and actually exercis'd the Prerogative of beſtowing the Fief upon the ſecond Son, tho' by a different Ventre. Becauſe he judg'd him to be a Man abler to perform Knightſervice than the other. " Galfridus de Mande- " ville Senex tenuit Baroniam de Merſewude—— & " genuit de primâ Uxore ſibi deſponſatâ Robertum " de Mandevillâ.—— Galfridus autem Senex de Man- " devillâ ——— aliam Uxorem deſponſavit de qui " genuit Radulphum de Mandevillâ Qui poſt obitum " ipſius Galfridi ſenis tenuit prædictam Baroniam per " voluntatem Henrici Regis eò quod fuit melior Mi- " les, quam Robertus de Mandevillâ Frater ejus. Preſcription. 3 H. 3. n. 56. Mag. Rot. 10. Joa. Re. Ro. 11. b. Dorſet. & Somerſet.

The

The Army of *William* the Conqueror was compos'd of several Nations, who in order to make their Fortunes by the spoil of the *English*, had Listed themselves in the Service of the *Norman*. " Galli namque & Britones, " Pictavini & Burgundiones, aliique Populi Cisalpini " ad bellum Transmarinum convolârunt & Anglicæ " Prædæ inhiantes. And among all those People, as well as in *Normandy*, the *Feudal Law* not only prevail'd, but was understood almost in the same manner. Now as I do not propose to Write a Just Treatise upon the Original and Nature of *Peerage*, but only to enquire into the Manner How! the Prerogative of creating *Peers* was antiently exercis'd by the Crown, I shall not carry my present Research higher than the Conquest. What Estate the Chief *Thanes* among the *Saxons* (who Mr. *Selden* says were the King's immediate Tenants of Lands held as of his Person by personal Services, which therefore he thinks to be a kind of Grand-Serjeanty) had in their Honours, or how they were created, not being necessary to be determin'd in the Examination of a Point, that as to the first part of it, turns chiefly upon the *Feudal Law*, as it was understood in *England*, soon after the Conquest.

Order. Vital. in Vi. Wi. 2. Tit. of Honor. p. 507--8.

Peerage according to the Common Opinion, is by three manner of Ways, that is, by *Tenure*, by *Writ*, or by *Letters Patents*. But before I enter into the Consideration of either of them, it must be observ'd that it is agreed by all, that from the Conquest untill the latter end of the Reign of *Henry* 3d the *Barons* were all Feudal and by Tenure, and Consequently their Appearance in Parliament during that time, can be consider'd no otherwise than as a Service annex'd and incident to the Possession of their Lands. *Henry* 3d, according to the Learned *Cambden* first began the Method of creating *Barons* by *Writ*, thereby excluding such of the lesser *Barons* by *Tenure* as he pleas'd, and bestowing an Equal Degree of Honour and Privilege upon Persons who were not *Barons* by *Tenure*, as upon those who were. Which Method of proceeding continu'd until the 11th of *Richard* II. who first introduc'd the creation of *Barons* by *Patent*. These three Periods of time, which exhibit so many different Stages of the *English Peerage*, are so remarkable, that I think I cannot observe a better Method than to make them the Heads of the following discourse.

In Britan.

The

The whole of Parliamentary buſineſs may be reduc'd under the two general Heads of *Advice* and *Conſent*; ſo far as the Conſent of the *Barons* was wanting to any Propoſition that might be made unto them, their Preſence in Parliament, and ſignification of their Aſſent, was abſolutely Neceſſary to enable the King to do ſome Act which by Law cou'd not be done without their Conſents. And as to the matter of Advice, their Attendance is to be conſider'd only as a Feudal Service, which by the Tenure of their Lands and the Oath of Homage they had taken they were oblig'd to pay unto the King as to the Superior Lord of their *Fiefs*. For it was a Notion Common to all the *Gothick* Nations, that their Kings had no Right to any Duties or Services whatſoever, but what were purely *Feudal*. Nor did any Man think himſelf oblig'd to the performance of any further Service, than was annex'd to the Tenure of his Lands. And therefore as to all other things that were *Extra-Feudal*, the particular Conſent of the Parties who were to perform them either in Perſon or by their Repreſentatives was abſolutely requiſite. Now it is abſurd to ſuppoſe that the Conquerors Native *Normans*, and much more ſo, that the Foreigners who were no Inconſiderable part of his Army, Fluſh'd with the Merit of Conquering a Kingdom for their General, wou'd ſuffer themſelves to be worſe us'd in *England* than they had been in their own Country. That Prince therefore, (who was not likely to abate any thing of his Juſt Prerogative,) never pretended to any thing from his Followers, that was not founded upon the known Principles of the *Feudal Law*, as appears by the Laws which he enacted; "Volumus etiam ac firmiter "præcipimus, ut omnes Liberi Homines totius "Monarchiæ Regni noſtri prædicti habeant & teneant "terras ſuas & poſſeſſiones ſuas bene & in pace liberè "ab omni exactione injuſtâ & ab omni Tallagio, Ita "quod nihil ab eis exigatur vel capiatur niſi Servitium "ſuum liberum quod de jure nobis facere debent & "facere tenentur, & prout Statutum eſt eis & illis a "nobis datum & conceſſum, Jure Hereditario in "perpetuum per Commune Concilium totius Regni "noſtri. Inter Leges W. 1. Lex. 55.

Parliaments were not formerly ſo regular in point of Form as they now are, ſince even the Number of Knights to be choſen for each Shire, to ſerve in the Houſe

Houſe of Commons was for ſome time uncertain. The first Writs for the choice of whom that are extant, are
M. 6. dor. 22 *Ed.* 1. by which Two Knights only, as at this Day, were directed to be choſen for each County: But then the King not being ſatisfy'd with that Number, as appears by another Writ entred upon the ſame Dorſe, the Sheriffs are commanded to cauſe Two other Knights to be choſen; Which way of Proceeding being at laſt thought inconvenient, was remedied by the Statutes of 5 *R.* 2. c. 4, 7. *H.* 4. c. 15. and ſeveral Other ſubſequent Statutes, which have contributed to the reducing the Houſe of Commons to that Method and Form we now ſee it in. Now one Reaſon why theſe Circumſtances were not determin'd in the Earlier times may poſſibly be, that they were then more concern'd about the Eſſentials of Government than the Forms. When no Prince in *Europe* had as yet imagin'd, that he had a Right to Rule in all things without a Parliament or Aſſembly of Eſtates; Provided the Conſent of the Perſons who were either to pay or perform any thing *extra-feodal*, was *bonâ fide* apply'd for and obtain'd, they were not over-ſollicitous concerning the Manner in which it was apply'd for and obtain'd. But as the People grew jealous of the Crown's deſigning to impoſe Contributions, *&c.* upon them without their Conſent, theſe (otherwiſe) Formalities were thought neceſſary to be regulated and fix'd. For certainly ſuch things have been formerly Done by each Houſe in Parliament, and that without any Complaint, which if they were now to happen, wou'd be univerſally condemn'd as Unparliamentary and Illegal. Both Lords and Commons have ſeparately and by themſelves given Aids and Subſidies unto the Crown; as for Inſtance,
Rot. Parl. m. 6. in 13 *Ed.* 3. the Lords granted to the King the Tythe of all the Corn, *&c.* growing upon their Demeſnes; the Commons at the ſame time granting nothing, nor any wiſe concerning themſelves, with what the Lords thought fit to grant out of their own Eſtates. At other times the Knights of Shires ſeparating themſelves as it were from the reſt of the Commons, and uniting themſelves to the Lords, have granted a Subſidy, and the repreſentatives of Cities and Boroughs have likewiſe ſeparately by themſelves, granted Subſi-
Rot. Pat. p. 1. m. 22. dies to the Crown, as appears by a Writ for the Collection of a Subſidy in 24 *Ed.* 1. " Rex, &c. Cum " Comitos

" ComitesBarones Milites, &c. nobis, &c fecerunt un-
" decimam de omnibus bonis suis mobilibus. Et Cives
" & Burgenses, &c. septimam de omnibus bonis suis
" mobilibus, &c. nobis curialiter concesserint, &c.

But further, when any Affair happened which was not Universal, but affected only particular Persons, it was common for them only to be summon'd. Hence is it, that we see among the Rolls Several Writs to this purpose, as, e. g. *Summonitiones ad Collequium, de veniendo ad consilium*, &c. Which tho' they have sometimes been mistaken for Parliamentary Writs are yet nothing but Summons of particular Persons to consult, and to contribute towards the expence of an Affair, in which they only (or at least chiefly) were concern'd. As in 35. *Ed.* 3. there is a Writ directed to *Humfry* Earl of *Northampton* (which *Dugdale* however has Printed in his Collection of Writs of Summons to Parliament) wherein after reciting the Confusion the Affairs of *Ireland* were in, and that he and several other *English* Lords had large Possessions in that Kingdom, and were therefore more particularly oblig'd to the defence of it, it follows " Volumus vobiscum & cum aliis de Rot.
" eodem Regno (Angliæ scilicet) terras in dictâ terrâ Claus. 35.
" habentibus colloquium habere & Tractatum Vobis E. 3. m.
" in fide & Ligeanciâ, &c. Mandamus, &c. But 36. dorso.
that the Reader may fully see, how strictly the Principle of no Person's being to be tax'd without their own consent was observ'd, he must know, that upon the same Occasion Writs were likewise directed even to the Ladies, who were Proprietors of Land in *Ireland*, commanding them to send their proper Attornies, to consult and consent to what should be Judg'd necessary to be done, in Relation to that Affair. " Rex
" &c. Mariæ Comitissæ Norfolc. Salutem, &c. Vo-
" bis in fide & Ligeanciâ, &c. mandamus quod——
" aliquem vel aliquos de quibus confidatis apud West-
" mon. mittatis—— ad loquendum nobiscum——su-
" per dictis negotiis—— & ad faciendum & consen-
" tiendum nomine vestro, super hoc quod ibidem
" contigerit ordinari.

If this Equity was therefore observ'd with respect to particular Persons, it is no wonder that it was always thought necessary, as well as reasonable, to consult the whole Kingdom in Parliament, upon all Affairs and Demands, which were extra-feodal and of a

concern. And therefore that great King *Ed.* 1. was ſo ſenſible of the Juſtice of this way of Proceeding, that he inſerted in his Writs of Summons to Parliament, as a firſt Principle of Law, and as his Reaſon for ſummoning Parliaments, *That in every Affair which related to the whole Kingdom, the Conſent of the whole Kingdom ought to be requir'd.* The Words are ſo noble that I may be forgiven if I tranſcribe them. " Rex, &c.

Rot. Clauſ. 24. Ed. 1.. m.4. Dor. " Sicut Lex Juſtiſſima providâ circumſpectione Sacro-
" rum Principum ſtabilita hortatur Ut quod omnes
" tangit ab omnibus approbetur, ſic & innuit evi-
" denter ut communibus periculis per remedia pro-
" viſa communiter obvietur.

It is agreed Univerſally, that the *Peers* or Lords of Parliament do relate to, and ſerve for the general good of the whole Kingdom, and as it is agreed, that every *Peer* ſits in the Houſe of Lords in reſpect only of his *Barony*, it will be neceſſary to inquire into the true Notion of the word *Peer*, and likewiſe what conſtituted a *Barony*, during this firſt Period of time of which we now treat. And altho' it is very true, that there were Great or Common Councils both in *England* and *Scotland*, before ſo much as the Inſtitution of Tenures of Land by Knight Service, *&c.* or of Manors in this Kingdom, and that therefore the *Feudal Law*, cannot be conſider d as the firſt Original or Foundation of Parliaments, (as has been by ſome Imagin'd) yet if we conſider the *Engliſh* Government only as it has been ſince the *Norman* Conqueſt, it will be found natural to look upon our *Anglo-Norman* Monarchy to be in *Great*, what every Manor is in *Miniature*, and that therefore our Parliaments do in a great meaſure reſemble, and may (not improperly) be ſtil'd the *Court Baron* of the Kingdom. And I cannot but think this to have been the Notion of Antiquity; for in the great Caſe between the two Kings of *Navarre* and *Caſtille*, which was referr'd to the Judgement of our *Henry* I. and his *Barons*, the *Judgement* is entred (if I may uſe that Expreſſion) in this Manner, *Comites & Barones Regalis Curiæ Angliæ adjudicaverunt.*

Brady.

Some Authors in order to magnify the Dignity of *Peerage* have aſſerted, that the Term of *Peer* is properly to be deriv'd from the Roman *Patricius*, or at leaſt from the *Patriciatus*, which in the decadence of the Roman Empire, was us'd to denote not only the moſt conſi-

derable

derable Dignity, but also Office of the Empire. As this was Originally a *French* Notion, and started perhaps with no other View than to flatter the *Peers* of *France*, I shall wave any further Consideration of it, since in fact (upon Examination) the term appears to be owing to a much more minute Original. And the word *Peers* or *Pares* is altogether feodal, signifying nothing but Men equal as to their Condition, Convassals in the same Court and Liege-Men of the same Lord. "Sunt autem *Pares* Curtis (Says *Cujacius*) Qui & "*Pares* Curiæ dicuntur nonnunquam & *Pares* Domûs, "Convassalli, Qui ab eodem Domino eademve Domo "feuda tenent; Non quasi Patricij, ut volunt Ignari "feudorum: with whom Sir *Harry Spelman* Concurrs, when he says "*Pares* dicuntur qui acceptis ab eodem "Domino puta Rege Comite & Barone feudis Pari "Lege vivunt. Et dicuntur omnes *Pares* Curiæ, Quòd in "Curiâ Domini illius cujus sunt Vassalli parem habent "Potestatem, Scilicet, Vassalli Regis in Curiâ Regni, "Vassalli Comitis in Curiâ Comitatûs, Vassalli Baro-"nis in Curiâ Baronis The Word *Peer* therefore, "tho' now it is by Custom, and κατ' ἐξοχὴν appropriated to the *Peers* of the Kingdom, was yet antiently equally applicable to the Tenants of what Lord soever. I think that I need not spend more time, in showing the Sense of this Word. Every one knows that in *Magnâ Chartâ* it is us'd in the most general Sense "Nullus Liber "homo, *&c.* nisi per Legale Judicium *Parium Suorum*. But in the Laws of *Henry* the first, the Word *Pares* or *Compares* is used in a perfect Feudal Sense, to denote the Tenants of the same Manor. "In Denelaga Lashe-"lutes, nisi super Sancta Jurare poterit, *&c.* Sive in "Comitatu, vel in quovis placito Regis fiat de suâ "vel alterius causâ, vel inter *Compares* in Curiis vel "divisis vel locis suis.

Recherches de Pasquier L. 2. c. 9.

Cujac. Com. in Lib. 1. de feud. tit. 1. p. 18.

In Glossar.

Cap. 29.

Cap. 34.

But further it must be observ'd, that altho' the term *Baron* as well as *Peer* has been by Common Usage appropriated to the Lords of Parliament, that yet antiently it was us'd to signify any Freeman whatsoever; The Freemen of the City of London are by our old Historians frequently styl'd *Barons*, so likewise of *York* and several other places. The Barons of the Cinque Ports retain their name unto this day. Nor is it Surprizing that this Word was so apply'd by those Authors, who were perfectly Ignorant not only of the

Elegancy, but also of the Propriety of the Language they wrote in. Very little therefore can be concluded from the Phrase of a Monkish Historian, who generally chose his Words at least as much for the sake of the sound, as the sense. For the Citizens of *London* have been styl'd not only *Barons* but *Heroes*, by *Ingulphus*, who giving the Character of one *Singinus* an Officer of what may be call'd the London *Militia*, says that he was "Inter omnes *Heroes Londonienses* Viribus Robustissi-"mus. The true Sense therefore of Words of this nature is not to be taken from the Historians, but from the Lawyers, and Legal Proceedings of Antiquity, from which it appears, that this Word came to be us'd in a perfect Feudal Sense, and to denote the chief Tenants of any Lord. For not only those who were the chief Tenants of the Crown, but also those who under them held great Quantities of Land by Feudal Services, were styl'd *Barons*. And the term *Baron* when apply'd to the Tenants of Land, was always relative to such or such a Lord. The Chief Tenants of the King were the *Barones Regis*, and so styl'd to distinguish them from the *Barons* of other Lords. Thus in *Chartâ Henrici* I. "Si amodo exurgat, placitum de divisione "terrarum, si interest *Baronc̃ meos Dominicos*, tractetur "placitum in Curiâ meâ. The Eight Barons of the County Palatine of *Chester* are so well known, that they need not be here mentioned; and the most considerable Tenants of the Abby of *Ramsey*, are in a Charter of *Henry* the First styl'd Barons of that Abby, "Sciatis "coram me testificatum & recognitum per *Barones de* "*Honore de Rameſiâ*. Which use of the Word is likewise common to other Feudal Countries; thus in the *Sicilian* Constitutions, to add no more (and I make choice of them as a Foreign Instance, because their Government, as well as ours, was of a *Norman* Original, and is therefore in many Particulars, at least till it was corrupted by *Spanish* Vice-Roys, very similar to that of *England.*) "Post mortem *Baronis* vel Militis, "qui a Comite vel *Barone* alio, *Baroniam aliquam* vel "Feudum tenuerit. The Terms therefore of *Peers* and *Barons* were antiently frequently us'd as synonimous; for as the *Barons* of the Crown were indifferently styl'd either *Barons* or *Peers*, so likewise were the Freeholders of every Manor, as is evident from the Phrase of *Court Baron* still in use.

De tenen. Comit. & Hundred.

Lib. Rameſien. apud Spelman.

Conſtit. Sicul. l. 3. tit. 22.

Barons

Barons and *Baronies* (as is before obſerv'd out of *Bracton*) were of the Eſſence of a *Gothick* Kingdom, in like manner as Freeholders are eſſential to a Manor. Every Man has a right to be try'd by his *Peers*, which is a right not originally peculiar to *Engliſhmen*, ſince as to Feudal Queſtions it was common to all the *Gothick* Nations, among whom it was an univerſally receiv'd Maxim, that no Man cou'd be diſſeis'd of his *Fief*, but by the Judgement of the *Tenants*, who were his *Peers*, of the ſame *Barony* or *Manor* of which it was held. And ſince all the Judicial Acts of a Lord are done in a *Court Baron*, which cannot be held without Freeholders, therefore by the *Feudal Law* every *Baron*, or (in the Senſe we now uſe it) Lord of a *Manor* was oblig'd to keep within his *Barony* a ſufficient number of Freeholders; or as it is expreſs'd in *French*; *Il eſtoit tenu de garnir ſa cour de Pairs*. Opinions are Various as to the preciſe Number that is requiſite; ſome have thought that in *England* three at leaſt were neceſſary to the preſervation of a *Manor*, ſince no leſs Number admits of a caſting Voice, and conſequently in many caſes no Judgement cou'd be given. But my Lord Chief Juſtice *Coke* ſeems to think two to be ſufficient. " For (ſaies he) If all the Free- " holders Dye but one, Or if the Lord purchaſe all " the Freeholders Lands or paſs away or releaſe all the " Services of his Freeholders, the Lord in ſuch caſe " has but a *Manor* in name, becauſe the Freeholders are " wanting which are the Maintainers of a *Court-Baron*, " &c. Which Doctrine and Diſpute has likewiſe been agitated in every other Feodal Country, as appears in *Du Freſne's* Gloſſary verbo *Par*. Diſc. on Copy-holds ſs. 31.

As the Feudal poſſeſſion of Lands was a Method Invented by the Conquerors to ſecure their Conqueſts, Every Man of the Conquering Army (among whom the Lands of the Provincials were divided) was oblig'd by Virtue of his Tenure, to pay a Military ſervice to his General whom they had then dignify'd with the Title of King. Which Tenure, tho' it was the moſt burthenſome, was yet the only noble, as it diſtinguiſh'd, and as it were pointed out the Conquerors of a Country. The Conquerors cou'd originally truſt none but their own People, and the *Romans* or Provincials (which were Synonymous Terms) were treated with the Utmoſt contempt, and depriv'd not only of their Lands but alſo of the Liberty of bearing Arms.

Tit. of Honor p. 712--3.

Arms. And therefore, as Mr. *Selden* obſerves, the word *Gentleman* is deriv'd from the Latin Word *Gentes* and *Gentiles*, which had been us'd among the *Romans* by way of Reproach, to denote ſuch Perſons as had not the honour to be Subjects of their Empire, and which were afterwards adopted by their Conquerors, and made to ſignify the Aggregate body of Nobility.

All the Tenants of the King who held by the ſame Service, might in a general ſenſe be ſtyl'd *Convaſſalli Regis*. But as in proceſs of time the term of *Vaſſus* and *Vaſſallus* came commonly to denote only military *Tenants*, and as the Word *Barones* in the ſame manner came to be apply'd only to the chief Military *Tenants*, of the ſame ſuperior Lord, no Perſons were ſtyl'd *Convaſſalli quoad Regem*, or *Barons*, but only thoſe who were the Immediate Military *Tenants* of the Crown, that is, who held their Lands *per Baroniam* of the King as of his Crown, for tho' others might poſſibly have no other Lord but the King, and be therefore in ſome ſenſe *Tenants in Capite*; yet their ſervices were regardant to ſome *Manor* or great Seignory *in Manu Regis*, that is, were paid to the King, not as King but as Lord of ſuch or ſuch a *Manor* which cou'd be alienated, and conſequently their Services transfer'd and made payable to ſome other Lord; whereas a *Tenure* in chief of the King as of his Crown, cou'd not be granted, but was inſeparably annex'd to the Royalty; and upon this Circumſtance it was, *inter alia*, that the Dignity of a *Baron* was chiefly founded. But this leads naturally to the Conſideration of a *Tenant in Capite*, which upon this Occaſion it will be neceſſary briefly to explain.

Some Writers upon this Subject have thought *Baron* and *Tenant in Capite* to be as it were Synonymous *Terms*. And Indeed Sir *Harry Spelman* does ſo far incline to that Opinion as to ſay, " Ævo Henrici 2di quævis " Tenura in capite habebatur pro tenurâ per *Baroniam*. For which ſenſe of the Word he vouches the Statute of *Clarendon*, wherein *inter alia* it is enacted. " Archi- " epiſcopi, Epiſcopi & univerſæ perſonæ Regni Qui " de Rege tenent in Capite, habeant poſſeſſiones ſuas " de Rege ſicut Baroniam & inde reſpondeant, *&c.* Now what has contributed to lead People into this Notion is, that in truth during the Antient times, a great part of the *Tenants in Capite* were actually *Barons*, or *Tenants* per *Baroniam*, and a great part of the reſt were reputed to be ſo, and ſome of them, who really

In Gloſſario.

were

were not *Barons* are yet so styl'd sometimes in old Historians and upon their Authority our *Heralds* are apt to put them into their Lists of antient *Peers*. The Old Historians were perhaps led into their mistake, by the difficulty there often was in distinguishing between a *Tenure in Capite per Baroniam* and *per Servitium Militis*, which in some measure might arise from this, that the number of *Knights* Fees, comprehended in a *Tenure per Baroniam* was uncertain, and that the Service of them both, when personally paid, was in a great many particulars very much alike. But what has confused some modern Writers still more, is a Notion they have entertain'd, that a *Tenure in Capite* was a distinct kind of *Tenure*, or rather Service different from all others, as Knight-service is from Socage, *&c.* When as it is a Circumstance only that may be true of all other Services whatsoever; for as the Term implys nothing but an Immediate Tenancy without any mesne between the Lord of the *Fief* and the *Vassal* who was seis'd of the Lands, it was applicable to a *Tenure* from any Lord whatsoever, and by any Service whatsoever. As appears from the *Formulare Anglicanum*, where *Alexander de Budicombe* sold Lands held of *Hawise de Gurney* Lady of the *Fief*, to *Thomas Fitz Williams*, to whom the Lady gave Seisin " Ad tenendum in *Capite* de me & de meis " Hæredibus sibi & suis Hæredibus. But indeed the great Matter in these *Tenures in Capite*, whether of the King or of a Common Person, was, that they were always *Tenures* in Grosse, fix'd to the Person of the Lord, and therefore not so lyable to be transferr'd over to any other Lord; whereas when Services were regardant to a *Manor*, they pass'd to any other person by a Grant of the *Manor*. And perhaps to avoid this Inconveniency, a Tenant wou'd sometimes pay a Fine to change one Lord for another, or a *Tenure* regardant to a *Tenure* in grosse. Thus " Anselmus Vic. Rhoth. r. c. " de dimidia marcâ auri, ut teneat in capite de " Episcopo Wintonienſi, terras quas tenuit de Thomâ " de Sancto Johanne.

Formul. Angl. nu. c.

Mag. Rot. 5. Steph. 13. a Bercheſcira.

But further there is no Foundation for thinking *Barony* and *Tenure in Capite* to be Terms Synonymous, because we find those Persons rank'd among the *Tenants in Capite*, who were never imagin'd to be *Barons*: So that the Truth seems to be, that tho' every *Baron*, properly so call'd, was a *Tenant in Capite*, yet a *Tenant*

in

in Capite was not by Reaſon of his Tenure a *Baron*; for the Number of the *Tenants in Capite* was always encreaſing, but that of the Feudal *Barons* always decreas'd. It was common for Men to pay Fines to the King, that they might hold their Lands *in Capite* of him, without its being ever imagin'd, that they were thereby created *Barons*. "Osbertus Sylvanus, r. c. de Septem Marcis Argenti, ut teneat in Capite de Rege feodum j Militis quod fuit Willielmi filii Gaufridi ——— Johannes Eſturmit. r. c. de xx s. pro xl ſolidatis terræ tenere de Rege in Capite —— Burgenſes de Lincoliâ r. c. de CC Marcis Argenti & iiij Marcis Auri, ut teneant Civitatem de Rege in Capite." Many other Inſtances might be added, but theſe are ſufficient; and I think that no Man can ſee any thing in them that looks like an Intention to erect a *Barony*. The Tenants, who perhaps held their Lands by different Services, and had Meſne Lords between them and the Crown, paid theſe Fines (without any Alteration of the Services they were to render) to get rid of their Meſnes, and become the immediate Tenants of the King.

Mag. Rot. 5. Steph. Rot. 1. b. Not. & Derb. Ibid. Rot. 2. a. Ibid. Rot. 12. a.

But as Tenure in chief might be of any Lord whatſoever, ſo likewiſe might it be by any Service whatſoever; as my Lord Chief Juſtice *Coke* obſerves, that a Man may hold of the King in Capite as well in Socage, as by Knight-Service: Which appears more fully in the Earl of *Marlbro*'s Treatiſe of Wards and Liveries, wherein he makes two diſtinct Chapters of *Tenure in Capite by Knight-Service*, and *Tenure in Capite by Socage*. Now Tenures in Capite, whether the Service reſerv'd be Knight-Service or Socage, are of two Sorts; 1. Where Lands are holden of the Perſon of the King and of his Crown, as of a Seignory diſtinct, in groſs, and paramount all other Seignories. ——— 2. Where Lands are held of ſome Honor or Manor that is in the Poſſeſſion or Seiſin of the Crown. And altho' that the Term of *Tenure in Capite*, in the Senſe now generally receiv'd, is moſtly applicable to the firſt of theſe, yet by reaſon that no Meſne Lord is in Fact between the King and the Tenant, it was formerly commonly apply'd to the other. My Lord *Marlbro'* indeed ſeems to think, that the Application of the Term in the ſecond Caſe was peculiar to thoſe Lands that were holden of ſome Honor that was antiently

Co. Litt. fl. 159.

tiently annex'd to the Crown, as *Barkinsted*, *&c.* but in Fact it was equally apply'd, to Lands that were held of any *County*, *Barony*, or *Manor*, which by Escheat or any other way whatsoever happened, to be in the Possession of the Crown. As for Example, *Richard de Ockbeare* held the fourth Part of the Manor of *Rillaton in Capite* of the King, as of the County of *Cornwall*. " Cornubia——Richardus de Ockbeare——dat' " Domino Regi xii s. vi d. de Relevio suo——de " quarta parte Manerii de Rillaton, quam——te- " nuit de Rege *in Capite* ut de Comitatu Cornubiæ in " manu Regis existente. " Tho' it ought to be observ'd, that *Coke* in his 12th Report does agree this to have been the antient Usage of the Word, but that however (as he adds) of latter times, " Dicitur de " Rege solummodo terras teneri in Capite. Paſ. fines, &c. 9 Ed. 2. Rot. 113. b. x. Eſtwick's Caſe.

I shall not particularly examine the Differences there are between these two kinds of *Tenures in Capite*, as not being necessary to the purposes of the present Discourse. But from what has been said it will appear, that the Notion of *Tenure in Capite* has been very much confus'd, thro' the promiscuous Application of the Term to both the above-mentioned Kinds of *Tenures in Capite*; without distinguishing which was particularly intended. Nor is it surprizing that those Things should be so obscure at this Day, when whilst they made a great Part of the Business of the Exchequer, and the Court of Wards subsisted, very intricate Disputes did happen concerning these Tenures. One of the Differences between these Tenures was, that personal Service was more strictly requir'd of the *Tenants in Capite ut de Coronâ*, than of the *Tenants in Capite ut de Manerio*, *&c.* And therefore in the ninth of *Edw.* II. *Gerard de Wachesham*, petition'd the King to be discharg'd from personal Service, and to be admitted to the Payment of *Escuage* Money, which was in lieu of it, upon a Suggestion that his Lands were held *in Capite*, as of the Honor of *Hagenet*. " Ad petitionem " Gerardi de Wachesham——continentem, quod " licet ipse teneat de Rege Manerium de Stanstede in " Comitatu Suff. per servitium unius feodi Militis " ut de Honore de Hagenet & non de Coronâ, per " quod Servitium aliquod Corporale——facere " non debet, sed Scutagium Regi——solvere te- " netur, " Other Petitions to the same Purpose might Trin. 8. R. 9 Ed. 2. Rot. 58. a. apud Madox.

be mention'd, upon all which Writs issu'd, directed to the Barons of the Exchequer, to search the Book of Domesday, the Book of Fiefs, and other *Memoranda* in *Scaccario* ; and if it should appear, that the Petitioners were *Tenants in Capite ut de Manerio, &c. & non ut de Coronâ*, that then the Prayer of their Petition should be granted. But indeed in those earlier Ages, they were so far from imagining that every *Tenure in Capite* of the King *ut de Coronâ* amounted to a *Barony*, and even if it did, so far were they from being ambitious of that Honor, that they apprehended nothing more than that the King (when any Honor escheated into his Hands) would change the *Tenure in Capite as of the Honor, to a Tenure in Capite as of the Crown*, and therefore it was made an expres's Article in King *John*'s *Magna Charta*, that it should not be done :

Mag Ch. Reg. Jo. " Si quis tenuerit de aliquâ Escaetâ, sicut de Honore " de Wallingford, &c. & de aliis Escaetis quæ sunt " in manu Regis & obierit, Hæres ejus non dabit " aliud relevium, vel faciet aliud Servitium quam fa- " ceret Baroni, & ut Rex eodem modo eam teneat, " quo Baro eam tenuit.

I have been the more particular in explaining the Nature of a *Peer*, or *Baron*, and of a *Tenant in Capite*, because it will enable us to apprehend what constituted an *Anglo-Norman Barony*. And I think it clear that every *Barony* was a *Tenure in Capite*, but then it is as clear that every *Tenure in Capite* was not *vice versâ* a *Barony*. And since the Term *Tenant in Capite* is, or at least was equally applicable to all Services, what distinguishes a *Baron* from all other *Tenants in Capite* cannot be the want of Mesnalty between himself and the Crown, for that is common to them all, but must be the reservation of some particular Services, of a Superior nature to the others, and which were imply'd in the Phrase *Tenere per Baroniam*.

As I do not propose to write a compleat Dissertation upon *Baronies* in their full extent, I shall not enquire particularly what those Services were, which were peculiar and essential to a *Tenure per Baroniam*, any further than is necessary to illustrate, what must be said as to the Power of creating them.

A *Barony* was a *Tenure in Capite*, and immediately Subject to the Crown, as *Edward* 3. expres's'd it. " Rex " *&c.* Sciatis quod *&c.* Richardus Comes Arundel

" ——— 24° Octobris —— fecit nobis Homagium pro Rot. Pat.
" Baroniâ ſuâ de Bromfeld & Yale ——— quam idem 27 E. 3.
" Comes de nobis tenet in Capite tanquam Coronæ p. 3. m. 3.
" noſtræ Angliæ immediatè ſubjectam. And there-
fore it often happened in the Caſe of Amerciaments,
that when any Man thought himſelf aggriev'd by be-
ing amerc'd as a Baron, he wou'd plead that he was not
a Baron (tho' at the ſame time he wou'd admit himſelf
to be a Tenant *in Capite) quia nil tenuit per Baroniam.* Hiſt. Ex-
As *Thomas de Furnival*, mention'd by Mr. *Maddox*, did. checq.
" Quia dicit quod non eſt Baro, neque tenet, nec un- p. 370.
" quam tenuit aliqua tenementa in Com' prædict. per
" Baroniam, nec per partem Baroniæ: Dicit enim
" quod tenet Manerium de Sheffeld de Domino Rege
" per Homagium tantum ——— Manerium de Wyrk-
" ſop & Greſthorp ——— de Rege ut de Honore de
" Tyckhull, &c.

It has been already obſerv'd, that the whole of Par-
liamentary Buſineſs, is reducible to the Heads of either
Advice or Conſent. The firſt of which is to be con-
ſider'd as a Feudal Service payable to the King as Su-
perior Lord of their Fiefs: The ſecond is Extra-feodal,
and depends upon thoſe Principles of Liberty that
were common to all the *Gothick* Nations. For every
Tenant per Baroniam did Homage to the King, by Vir-
tue of which he was oblig'd, whenever Summon'd, to
attend him. The Profeſſion of Homage did compre-
hend in it, that the Tenant was oblig'd, *inter alia*, to
ſerve his Lord with his Councel and Advice. And for
this reaſon all the antient Writs of Summons, did run
in theſe terms " Vobis mandamus fide & Homagio
" quibus nobis tenemini. Which Words Sir. *Harry* In Gloſ-
Spelman and my Lord Chief Juſtice *Coke*, think to be ſario.
relative only, to the *Feodal Barons*. And the Chief Juſtice 4 Inſt. p. 5.
adds, that the reaſon why the *Barons* are now ſummon'd
only in *fide & Ligeantiâ*, is becauſe that there are no
Feudal Baronies extant, tho' it is certain that ſeveral
Barons who were *Feodal*, have been alſo ſummon'd *in fide*
& Ligeanciâ. So that tho' a Summons in *Homagio* is an
Argument that they were *Feudal Barons*, a Summons *in*
fide & Ligeanciâ is no Proof they were not ſo.

Whatever Notions are now entertain'd of an At-
tendance in Parliament as an Honor, a Privilege, *&c.*
in the Earlier Ages of our Monarchy, it was look'd
upon in a quite different light; and was eſteem'd to

be a Service, a Burthen, incident to the Tenure of their Lands, from which many were desirous to be deliver'd. The Clergy, who now think the *Baronies* annex'd to their Bishopricks to be advantageous, did Originally complain of them as a Burthen and Imposition upon the Church. " Rex Willielmus pessimo
An. 1070. " usus Consilio (says *Matthew Paris*) Episcopatus & " Abbatias omnes quæ Baronias tenebant in purâ & " perpetuâ Elemosynâ sub servitio statuit militari. And therefore when they were Summon'd to Parliament, many of them wou'd Petition to be discharg'd from their Attendance, upon a suggestion that they held no Lands *per Baroniam*. My Lord C. J. *Coke* affirms that a Regular ought of necessity to hold *per Baroniam*, before he cou'd be oblig'd to serve in Parliament, since if he did not, he cou'd lawfully refuse his Attendance, and goes so far as to say, that even the Charter of *Henry* 8. to *Banham* Abbot of *Tavistocke* was void in Law, because he was not a *Tenant per Baroniam*. But the Consideration of what he further adds, that a Layman was oblig'd to attend when Summon'd, whether he was a *Tenant per Baroniam* or not, must be reserv'd till I come to treat of Barons by Writ. In the mean time I shall make some Observations upon the Original manner of creating *Barons by Tenure*, by which the Reader may form some Judgment how far the King had it in his Power, to encrease *ad libitum* this first Species of Peers.

Selden's tit. Hon. 604. *a.* 7. 4. Inst. 44-5.

1. Baronage by Tenure is founded upon the Feudal Law, as it was understood by the *Normans* for some time after the Conquest. At which time the Conqueror took into his own Hands (as his share of the Plunder) all the *Demesne* Lands of the Crown, and whatever had belong'd to, or been in the Possession of, *Edward* the Confessor at the time of his Death; the rest he divided amongst his Army, the greatest part of which had follow'd him with no other View than to make their Fortunes. And indeed he was very liberal to many of them, as for Instance, the whole County of *Chester* was granted to *Hugh Lupus*. *Robert* Earl of *Moreton* in *Normandy* and of *Cornwall* in *England*, had a grant of no less than 793 Manors. *Alan* Earl of *Britaigne* and *Richemonde*, 442. and *Geofroy* Bishop of *Constance* had 280. These Grants of the Conqueror, tho' they were made as Rewards for Services, must not however

however be attributed to the greatneſs of his Generoſity, but to the Neceſſity of his Affairs, ſince without it, the Officers of his Army wou'd undoubtedly have mutinied, for they did never look upon them as Matters of Grace but of Right. At leaſt the great Earl of *Warren* thought ſo, when he produc'd his Sword as his Warranty for his Land, in Anſwer to a *Quo Warranto* brought againſt him, adding, "That *William* the "Baſtard did not Conquer the Kingdom himſelf, but "that his Anceſtors were Joint Adventurers in the "Enterpriſe, and Sharers and Aſſiſtants therein. Dugd. Bar. Vo. 1. p. 79.

The Services reſerv'd upon theſe Grants, are the Foundations of *Baronage*, and were firſt enacted by the Conſent of the Grantees themſelves, to which they were eaſily induc'd, thro' the Neceſſity there was of them for the Security of their new Acquiſitions, but to ſpeak in Modern Language, Feudal Services, and conſequently *Feudal Barons*, were firſt Inſtituted in Parliament. And indeed it was natural that the Officers of his Army who had obey'd him as their General, ſhou'd be conſulted as to what Services they wou'd pay to him as their King, after that they became the moſt conſiderable Land-holders in the Kingdom. It was natural likewiſe that the Conqueror himſelf, ſhou'd upon ſuch an Occaſion ask their Advice and Conſent, ſince in ſo doing he did but follow the Steps of his great Anceſtor *Rollo*; for Feudal Services were in all probability, firſt eſtabliſh'd in *Normandy* by him, with the conſent of the Officers of his Army, by whoſe Aſſiſtance he had Conquer'd that Dutchy, if we may rely upon the Authority of *Dudo Sc'tus Quintinus*, who wrote in the Time of *Richard* the Firſt Duke of *Normandy*, and 200 Years before our Conqueſt, "Terram ſuis Comitibus & ſuis fideliter funi-"culo diviſit; ſecuritatem omnibus Gentibus in ſuâ "terrâ manere cupientibus, fecit. *Jura Legeſque ſem-* de Mor. "*piternas, voluntate Principum ſancitas & decretas*, ple- Norman. "bi Indixit." But it is not ſufficient to ſay that it Lib. 2. is natural to ſuppoſe, theſe Military Tenures to have been firſt founded by a common Conſent; Let me further add therefore, that our oldeſt Authors do alſo affirm it. *Bracton* in plain terms affirms them to have been inſtituted at the Conqueſt, "Regale ſervitium Lib. 2. "quia ſpecialiter pertinet ad Dominum Regem & non ca. 16. "ad alium, & ſecundum quod in Conqueſtu fuit ad-"inventum.

" inventum." In which Words he seems to refer to the 58th Law of *William* I. " De Clientum seu Vas-
" sallorum præstationibus,----wherein the Conqueror himself owns them to have been establish'd by common Consent. " Statuimus etiam & firmiter præci-
" pimus ut omnes Comites & Barones & Milites, &
" Servientes & universi Liberi Homines totius Regni
" nostri prædicti habeant & teneant se semper benè
" in Armis & in Equis ut decet & oportet, & quod
" sint semper prompti & bene parati ad servitium
" suum integrum nobis explendum & peragendum
" cum semper opus affuerit, secundum quod nobis de
" feodo debent & tenementis suis de Jure facere, &
" sicut illis statuimus *per commune consilium totius Regni*
" *nostri prædicti*, & illis dedimus & concessimus in feo-
" do Jure Hæreditario."———My Lord C. J. *Hales* observes upon these Laws of *William* I. that they were not Impos'd *ad libitum Regis*, but that they had a Parliamentary Authority, which he supposes to have been in the fourth Year of his Reign, in a Parliament as sufficient and effectual, in his Opinion, as was ever held in *England*. Which is supported by the Authority of *Hoveden*, who in the Life of *Henry* II. speaking by way of digression of *William* I. says, that " quarto
" anno Regni sui, consilio Baronum suorum fecit
" summoneri per universos Consulatos Angliæ, *&c.*
" Electi igitur de singulis totius Patriæ Comitatibus
" Viri duodecim."

Hist. of Law, p. 108.

Hoveden.

Altho' the Possession of Lands in those Times was attended with very great Burthens, such as Marriage, Ward, Relief, *&c.* Yet it is not surprizing that the *Norman* Chiefs shou'd agree to them, since they were the same Terms and Services upon which they held their Lands in *Normandy*. What *Polidore Virgil* Imagines, *viz.* that these Services were introduc'd by *Henry* III. is absurd, since it is manifest from the *Custumiere de Normandie*, in the Chapters, " *de*
" *garde dorphelius, de relief, de aides chevelx*, &c." that they were in some Measure practis'd in *Normandy* before the Conquest, and indeed in most Parts of *France*, and the Conqueror himself during his Minority was in Ward to the then King of *France*. But it wou'd extend this Treatise to too great a Length, if I shou'd pursue this Subject any further, I shall content my self therefore to observe, that this Similitude of Tenures

Lib. 16.

Cap. 23, 24, 25.

nures to what they were in *Normandy* (where like as in *England*, none but those who held in chief of the Duke, as of his Dutchy, had a personal Right to sit in the Assembly of their States) was so well understood at that time, that an Entry in Domesday is made, that such a one held Lands, according as it was us'd in *Normandy*. " Habet —— in eodem feodo de W. Comite Radulpho deLimes 50 carucat. terræ sicut sit in Normanniâ. Domesday.—

And in *Scotland* likewise it seems to have had a Parliamentary Original; " Indicto ad Sconam Conventu (says *Buchanan* in the Life of *Malcolm* II.) " omnes Agros Regios eis divisit——Nobilitas contrà Regi concessit, ut cum eorum aliquis moreretur, " Liberi ad vigesimum primum ætatis annum in Tutela Regia essent." This Account, if it be true, supposes *Ward* to have been introduc'd into *Scotland* sixty Years before our Conquest; *Malcolm* II. beginning his Reign *anno* 1004. Perhaps there may be some Mistake in it; for as it is probable the *Scotch* did receive many of their Feudal Customs from *England*, as we did from *France*, and *Buchanan* himself speaking of this Custom in particular, admits it to have been borrow'd from the *English*; " Hunc morem potius ab Anglis & Danis acceptum credo:" It is not improbable but that what is storied of *Malcolm* II. as to this Alteration of their Law, ought rather to be understood of *Malcolm* III. who liv'd quite thro' the Conqueror's Reign, and first introduc'd the Feudal Titles of Honor, as of *Earl*, *Baron*, *&c.* into that Kingdom. Lib. 6. Ubi suprà

But be that as it will, this seems to be more than probable, that these *Tenures* were introduc'd into *England* by Common Consent, or by Parliament. Nor was the Number of *Tenants in Capite* at first so numerous, but that they might well all meet together for the Dispatch of any Business that concern'd them all; for in the Time of *William* the Conqueror there were not quite seven hundred Lay *Tenants in Capite*; who, together with the Bishops, Abbots, *&c.* under the King, held all the Lands in the Kingdom, and of whom all other Persons whatsoever held. Now of these *Tenants in Capite*, the reserv'd Service of the greatest part of them was but *Petit Serjeanty*, and consequently the Number of those, who held *per Comitatum vel Baroniam* could not be very large. Domesday.

But

But besides this, that the first *Barons*, or rather the first *Baronial Services*, were originally instituted by Common Consent, that is, in Parliament, there is another Consideration to be added, which arises from that Portion of Power which the antient Kings of *England* had over their Crown-Lands, or Demesne; for it was by Grants of them only, that it was possible to encrease the Number of *Feudal Baronies*; since, as has been before observ'd, at the Conquest, all the other Lands of *England* were either portion'd out among the Followers of the *Norman*, or else the Possession confirm'd to those old *Saxon* Proprietors, who had not been in Arms against him, with this Difference only, that new Services, *&c.* were reserv'd, which were first establish'd by the *Normans*; and to which perhaps during their *Saxon* Government they had not been oblig'd.

In this Distribution of Lands ample Provision was made for the Support of the Royal Dignity; for no less than 1422 Manors or Lordships, together with other Lands scatter'd up and down in the Counties of *Middlesex*, *Salop*, and *Rutland*, were appropriated to the Crown, over and above some Quit-Rents, and the Services that were paid out of those which were granted away. *Ordericus Vitalis* says, that the settled Rents of *William* I. amounted to no less than the Sum of 1061 *l.* 10 *s. per Diem*; which, supposing Money to have been ten times the Value it is now, is near four Millions sterling *per Annum*; "Ipsi Regi 1060 Libræ "Sterilensis Monetæ Solidique triginta & tres Oboli "ex justis redditibus Angliæ per singulos Dies red- "duntur." I think it may be here observ'd, that this Author relates this Passage of the Royal Revenue in the same Year in which the Laws of *William* I. and Feudal Services were establish'd, *viz. Anno* 1070, the fourth Year of the Conqueror's Reign, which began in the Year 1066. *Fortescue* therefore had some Reason to say, that the King of *England* at first had the greatest Revenue of any Prince in *Europe*. Of this Revenue, speaking of the Article of *terra regis* in Domesday, Sir *Robert Cotton* says, that our Forefathers thought it impious to alienate it.

Ord. Vit. a: 1070. p. 523.

De Dom. Reg. & Polit. ca. 11.

Op. Post. p. 179.

And as to the Question, whether it was so, or not? The Reader must judge, according as he thinks, it either a good or bad Consequence to say, that what

was

was part of the Coronation-Oath, was also part of the Law: And that was antiently to this Purpose, "That he shall keep all the Lands, Honors, and "Dignities righteous and free of the Crown of *England* in all manner holy, without any manner of "Minishments, and the Rights of the Crown hurt, "decay, or losse, to his Power shall call again into "the antient Estate." Which Doctrine agrees with all our antient Lawyers. For *Fleta* upon this Occasion relates, that all the Princes of *Europe* in the fourth Year of our *Edward* I. bound themselves in a solemn Meeting at *Mont-Pellier* to revoke all Grants which had been made of their Crown Lands. Which Story (tho' it is by *Selden* demonstrated to be impossible to have happen'd) does yet strongly show the Sentiments of that Author. "Res quidem Coronæ sunt "antiqua Maneria Regia Homagia Libertates, & hu- "jusmodi quæ cum alienantur, Rex ea revocare "tenetur, secundum provisionem omnium Regum "Christianorum apud Montem-Pessoloniam, Anno "Regni Regis Edvardi filii Regis Henrici quarto ha- "bitam." And in another Place he expressly affirms the Law so to be; "Antiqua Maneria vel Jura Co- "ronæ annexa, Regi non licebit alienare; sed omnis "Rex Coronæ suæ alienata revocare tenetur." And therefore he in another Place says, that the Officers of the King were sworn never to consent to any Alienation. "Item quod nihil consentient alienari, de "hiis quæ pertinent ad antiquum Dominicum Coronæ "Regis." And *Bracton* to the same purpose says, that "Est res quasi sacra, res fiscalis quæ dari non po- "test, nec vendi, nec ad alium transferri a Principe "vel a Rege regnante. And *Britton*, in the Name of *Edward* I. says, "Rois aussi ne poürront rien aliener "en droit de lour Corone ne de lour Royaltè que il "ne soit repealable per lour Successours." But this Law was not particular to *England*, since it prevail'd in all the Feudal Countries. *Hottoman* affirms it to have been the antient Law of *France*. "In Gallia quidem "nostra Rex sine publico Gentis concilio, quod trium "ordinum Conventus adpellatur, nihil nec alienare, "ac ne oppignorare quidem potest." It is needless to insert more, since I hope my Reader will believe it easy to prove it to have been the Law of all other Countries.

Coll. of Oaths, p. 1.

Lib. 3. c. 6. ff. 3.

Lib. 1. c. 8.

Lib. 1. c. 17.

ff. 17.

Lib. 2. cap. 5.

cap. de Dons.

Quæst. Illust. 16

As this Law is now antiquated not only in *England*, but in all other Nations, what has been said, can relate to the Law, only as it stood for about 200 Years after the Conquest, during which time, it is agreed that all our Barons were Feudal. But then it obviously follows, that during that time, it was not possible for the Crown to increase the Number of Baronies: For all the Land of *England*, except what was reserv'd in Demesne, being granted out to be held by different Services, as *per Baroniam*, *per Servitium Militis*, *&c.* the Crown had no Land to dispose of, but only such as shou'd happen to Escheat by the Death of any of those Grantees without Heirs, or Forfeiture, *&c.* So that in short this Observation amounts to this, that no *Feudal Baron* cou'd be without Lands, and that the King had no Lands to Grant but Demesne, and that they being by Law unalienable, it was only the Power of regranting Escheats that was in the Crown; which is exactly consonant to the Feudal Law, as express'd by *Molinæus*, who after asserting that a King cou'd not alienate his Demesne Lands, adds, "Feuda, Subfeuda, "& alia quæcunque immobilia ab eodem Domanio "dependentia, quæ ad Regem Jure Confiscationis vel "Commissi deferuntur, possunt libere per eum alienari & in perpetuum concedi.

Tit. de feod. S. 43. n. 184.

Upon this Occasion it will illustrate what has been said, to observe, that when Lands which were *Baronies* escheated into the King's Hands, the *Barony* was not dissolved, but subsisted as a *Barony in manu Regis*, and as such were to be granted over. Lands held in Antient Demesne, when they devolv'd into the King's Hands became Frank-Fee, and as such were accounted for by the Fermours. But *Baronies* always retain'd their Name and Nature, and as such were accounted for in the Exchequer: As for Example, "Willielmus le Puher & "Hugo Pincerna r. c. de L *l.* & viii *s.* de firmâ *Honoris* Willielmi de Curci de parte illâ quæ est in manu "Regis." So that tho' the King cou'd not encrease the Number of *Baronies*, it sometimes happen'd that he cou'd the Number of *Barons*, by a Person's dying without Heirs, *&c.* who was possess'd of several *Baronies*, which in such case might be granted to several Persons.

Mag. Ch. Joan Reg. supra citat. 21 Assis. pl. 13. Madox Cap. de Escheats, &c. Mag. Rot. 19 H. 2. Rot. 5. a.

3. It

3. It may be alſo further obſerv'd, that *Honor* and *Barony* were formerly uſed as Synonymous Terms. Sir *Harry Spelman* ſays, " Honor igitur ab Anglo-Nor- " mannis dictum videtur, unius cujuſque Majoris Ba- " ronis feodale Patrimonium ſeu *Baronia*." And *Gervaſius Tilburienſis* ſpeaking of the Manner of accounting for the Ferms of Eſcheats, ſays, that if the Land accounted for be a *Barony*, it ought to be entituled, the Account of ſuch an *Honor*. " Verum dum in manu " Regis, de hoc ſic ſcribetur in Annali; Ille Viceco- " mes reddit Compotum, de firma illius *Honoris*, ſi " *Baronia* eſt." Now in *Croke's Elizabeth*, it is agreed *per Cur'*, That a Manor cannot at this day be made by the Crown; with whom my Lord *Coke* agrees in his Diſcourſe concerning Copy-holds, *& alibi*. And in *Croke's Carol'* it is likewiſe agreed, that an *Honor* conſiſts of many Manors united together: from whence it follows, that as the Crown cannot create a Manor, ſo likewiſe it cannot create an *Honor*, and conſequently no Power but that of the King in Parliament can create a *Barony*. Conſiſtent with which Notion of the Law, *Henry* VIII. who cannot juſtly be ſuſpected of being a Prince willing to diminiſh his Prerogative, did derive his Exerciſe of this Power from an Act of Parliament; for in 31 *Henr.* 8. the King's own Manor of *Hampton Court*, was by Act of Parliament made an *Honor*; by which Act the Manors of *Byflete* and *Weybridge* in *Com' Surr'* and ſeveral other Manors, are made part and parcel of that *Honor*. So likewiſe in 33 *Hen.* 8. other Acts to the ſame purpoſe paſs'd in favour of the Manors of *Ampthil* and *Grafton*, by which they were made *Honors*. And I believe that no Inſtance can be given from the Conqueſt unto this day, of any *Honor*'s being erected otherwiſe than in Parliament.

In Verbo.

In Cap. de Exceden- tibus. p. 38.

Morris *v.* Smith.

Seagood *ver.* Hone & Ux'.

Cap. 5.

4. But to conclude this Point of *feudal Barons*, I ſhall laſtly obſerve, that by Intendment of the antient Common Law, *Every Baron was feudal*, and many of their Privileges were founded upon that Suppoſition. As for Inſtance, their Perſons are free from Arreſts at the Suit of a Subject, nor will a *Capias* or *Exigent*, &c. lie againſt them. The plain reaſon of which Privilege is, that the Law ſuppoſes them to be of Fortunes ſufficient to anſwer all Demands, which Intendment of the Law does ſeem obviouſly to be

Coke 12. Rep. *Counteſs of* Salop's *Caſe*.

founded upon their being consider'd in Law as *feudal*, and that consequently there wou'd be always upon the *Demesnes*, &c. of their *Baronies* sufficient to distrain for the Satisfaction of any Debt. Another Privilege is, that they are not liable to serve on Juries. But the Writ for their discharge, does suppose every Person who claims the Benefit of it, to be an actual Baron, since it begins "Rex, *&c.* Quia Barones "Regni nostri, *&c.*" And accordingly the Judges did antiently suppose every *Baron* to hold *per Baroniam*, or at least *per partem Baroniæ*. As for Instance in relation to this very Point of their being discharg'd from serving on Juries, 22°. *Ed.* 3. "Puis un fut chal' purc' "qu'il fut a Bannier' & non allocatur car s'il soit a "bannier' & ne tient pas par Baroni, il sera in l'assise." And at another Time, Sir *Ralph de Everden* brought a Writ for his discharge. And *Belknap* "luy oppos' s'il "tient per Baroni——& s'il avoit tout son temps "ven' au Parl' come Baron duist venir. Et il dit qu'il "tient per certein part d'un Baroni——il fut dis-"charge." My Lord *Coke* explains, *ne tient pas per Baroni*, &c. as if it was necessary, that besides his Tenure he ought to be a Lord of Parliament; But it seems probable that this Privilege was not peculiar to an Attendance in Parliament, but Incident to a Tenure *per Baroniam*. For altho' that after the 49. *H.* 3. when the *Majores Barones* were separated from the less, no *Barons* had a Right to come to Parliament, but only those to whom Writs were directed, yet the lesser *Barons* did for some time preserve all the other Privileges that were incident to their Tenure. Of which this is one, and this Case is a Proof of it, for this Sir *Ralph de Everden*, who as the Book says was (*per bon avise*) discharg'd from serving on the Assise, never was a Lord of Parliament, nor does it appear by the Lists of Summons, that any Man of that Name was ever summon'd to Parliament. This Case is the more remarkable, because it is always referr'd to by the Generality of our Lawyers upon a Supposition that he was a Lord of Parliament. Particularly by *Doddridge*, who likewise commits the same Error in relation to *Theobald de Bordmor*, one of the *Marcher Barons*, who being Impannel'd upon a Jury claim'd this Privilege. But no Man of that Name was ever summon'd to Parliament, tho' in fact he was a *Baron*, that is, a

Regis. Br. p. 179. b.

22 *Ed.* 3. fo. 18. *a.*

48. Assi. p. 6.

Treatise of Nobility, p. 39.

Tenant

Tenant per Baroniam, for the Truth is, that tho' every Lord of Parliament was a *Baron*, yet from the Time of *Henry* III. every *Baron* was not a Lord of Parliament. And this Distinction leads us to the Consideration of the second Species of *Peers*, and that is *Peers* by Writ.

The common Notion of *Barons by Writ*, is chiefly founded upon the Authority of Sir *Edward Coke*, who does say that if the King calls any Lay-man to the Upper House of Parliament generally by his Writ, that he is thereby, provided he once sits, in Consequence of it, created a *Baron* and *Lord of Parliament* to him and his Heirs for ever. I particularly use the Word *Lay-man*, because in another place he affirms, that a Lay-man when summon'd was oblig'd to attend, but that a Regular was not, unless he held of the King *per Baroniam*. 1 Inst. fo. 9. b. and fo. 16. b. 4 Inst. p. 44.

The Number of the *Tenants per Baroniam*, was not near so Numerous as it has been by some imagin'd (deceiv'd by such Expressions as *Infinita Multitudo Baronum*, *Numerosa Nobilitas*, &c.) Since, as *Matthew Paris* relates, King *Henry* III. when he was at St. *Albans* caus'd a List to be made of all the *Baronies* in *England*, and they amounted but to the Number of 250, according to the Edition of 1571, (tho' *Cambden*'s Manuscript mention'd in his *Brittannia* reads 150) "Nominavit idem quoque Dominus Rex & Memoravit "omnes Angliæ Baronias quarum ei occurrit Memo- "ria invenitque ducentas & quinquaginta." Now if it be consider'd that many of these Baronies might escheat into the King's Hands, and that many of them might also be in the Possession of one Nobleman, *&c.* it does seem very probable, that the Number of Lords cou'd not at any Time have been greater than it now is. And if it be also consider'd, that the Number of the King's *Tenants in Capite* in Domesday did not (as is Above mention'd) exceed Seven Hundred, and that the greatest part of them held by Inferior Services, as *Petit-Serjeanty*, &c. it will not be reasonable to suppose there ever cou'd be more than 250 *Tenants per Baroniam*. Which agrees with what appears in the *Rolls* about five or six Years after. When Writs of Summons were sent to all the *Barons* of *England* to attend the King against the *Welch*, *cum Equis & Armis*; Of the Temporal Barons one hundred and thirty three, *Matt. Paris.* *Selden-tit.* Honor 592.

three, and of the Spiritual fifty were ſummon'd *ad habendum ſervitium ſuum*. During the Time that the *Baronage* ſubſiſted wholly upon a Feudal Foot, it is obvious that every Man who held *per Baroniam Integram* had a right to be ſummon'd to the great Councils of the Nation. But as a great Number of them grew weary of their Attendance, becauſe of the trouble and expence of their Journies, they were in Proceſs of Time neglected to be ſummon'd. And at laſt the *Barons* of the Antienteſt Foundation, who had the greateſt Revenues, and conſequently the greateſt Power, were ſtil'd *Majores Barones*. For (as has been already obſerv'd) the King had a Right to grant over all eſcheated Baronies, but as he was not perhaps oblig'd to grant them upon the ſame Services, it was frequent to reſerve more burthenſome Services (as *e. g.* a greater Number of Knights, *&c.*) upon the new Infeoffment, than the firſt Grantee had been oblig'd to perform. Which Circumſtance was likewiſe common to the *Tenants in Capite by Knights-Service* only, as well as to the *Tenants per Baroniam*. And from hence aroſe the difference between the *feoda Veteris & Novi feoffementi*, which are diſtinguiſh'd in the account of the Aid *pur fille marier*, that was granted to *Henry* II.

Lib. rub. in Scacar.

" Reginaldus de Warrennâ *r. c.* de *ix l.* & *x s.* de Mi-
" litibus Honoris de Wurmegai. In *th. l.* & *Q. e.*
" Idem debet *xl. d.* de *novo feoffamento.*" But in order to collect this Aid the better, All the King's *Tenants in Capite*, by what Service ſoever, were oblig'd to tranſmit Certificates into the Exchequer of what Fiefs they held, which by a general Name were call'd *Chartæ Baronum*, tho' they were not all Barons, as *e. g.* " Char-

Lib. rub.

" ta Albani de Hairun Domino ſuo Excellentiſſimo
" Henrico Regi Angliæ Albanus de Hairun ——
" notifico quod in Hertfordſcirà feodum unius Mili-
" tis de Veteri feoffamento, de Vobis principaliter
" teneo, & quod de novo feoffamento nichil habeo.

But it is not only that the new Infeoff'd *Barons* were not ſo rich as thoſe of the antient Date, but the Old *Barons* thinking to aggrandize their Dignity by not ſuffering the Grantees of theſe Eſcheated *Baronies* to be ſummon'd to Parliament, as *Barons* indifferently with themſelves, did in ſome Parliament (as Mr. *Selden* judges) that preceded the Grand Charter, obtain a Law, that only the *Majores Barones* ſhould be ſummon'd

mon'd for the future. But indeed this Inclination of the *Greater Barons* shew'd itself strongly, during the Reign of King *John*; in whose Great Charter, as printed in *Matt. Paris*, and also in the *French* Copy publish'd by Monsr. *D'Herouall*, a Clause is inserted to this Purpose. "Ad habendum Commune Concilium "Regni, faciemus summoneri Archiepiscopos, Episcopos, Abbates, Comites, & *Majores Barones* Regni "sigillatim per literas nostras." Tho' I think it may be here observ'd, that this Clause is not in that Charter of King *John*, which I have seen under the Seal of that King in the Custody of the late learned Bishop of *Sarum*.

And this was the first Foundation of *Barons* by Writ (as they are now call'd) tho' it is plain from what has been said, that the Writ was not by these Laws made any ways essential to a *Barony*, but only that tho' they were *Barons*, they should not have a Right of appearing among the Greater *Barons*, because they were not particularly summon'd: So that it was not their *Barony*, but their Right of Voting in Parliament that depended upon the Writ. But this Regulation of the *Peerage*, or *Barons of Parliament*, was not compleated in the Reign of King *John*. His Son *Henry* III. (after the entire Defeat of the *Barons* at the Battle of *Evesham*, thereby putting himself in a Condition to treat the greatest part of them as Rebels) put the finishing Hand to this Regulation, which was afterwards observ'd by *Edward* I. and some of his Successors. And here it must be observ'd, that *Henry* III. did not by his Law propose to establish a Prerogative of creating any Person a *Baron of Parliament* by his Writ, whether he was a *Tenant per Baroniam*, or not. On the contrary, he left the being or not being a *Baron* upon the Foot he found it, introducing only this Rule for the future, *viz.* That none of the *Barons*, or *Tenants per Baroniam* should have Voice in Parliament, but those only to whom he should direct a Writ of Summons; for so are the expres Words of the Manuscript cited by *Cambden*: "Ille enim (Rex In Britan.
"scilicet Henricus III.) post magnas perturbationes "& enormes vexationes inter ipsum Regem, Si"monem de Monteforti & alios Barones motas & so"pitas, statuit & ordinavit, quod *omnes illi Comites &* "*Barones Regni Angliæ, quibus ipse Rex dignatus est, Bre*-

"*via*

" *via Summonitionis dirigere venirent ad Parliamentum*
" *suum, & non alii*, nisi fortè Dominus Rex alia illis
" brevia eis dirigere voluisset. " This Law was probably made in the Parliament held 49 *Henry* III. immediately after the Battle of *Evesham*, to which were summon'd of the Spiritualty no less than 36 Priors, and 65 Abbots, besides the Bishops, five Deans, and the Master of the Temple, but of the Temporalty not 30— by whom the Vanquish'd *Barons* were forfeited, and their Lands seiz'd into the King's Hands. But this Severity did not quiet the Nation, the Sufferers being too many to be us'd with such Rigor. The distress'd Barons again took Arms, and the Year following compell'd the King to agree to a more reasonable Composition, by which they were restor'd to their Estates upon the Payment of moderate Fines. And accordingly we find, in the very next Writs of Summons that are extant, a greater Number of Temporal Lords summon'd, *viz.* 12 Earls, and 53 Barons.

dictum de Kenelw.

Rot. cl. 23. Ed. 1. m. 9. dor.

Having in this Manner explain'd what, as I apprehend, gave the first Occasion for the Term of *Barons* by Writ, in order to judge more clearly what Operation in Law this Writ could antiently have, it must be consider'd, that it could not possibly be directed but to three Sorts of Persons; that is, either to such as were *Tenants in Capite per Baroniam*, or to such as were only *Tenants in Capite by Knight-Service*, &c. or else to such as were not the immediate Tenants of the Crown at all. And as to the first of these, they were oblig'd to attend if summon'd, and as they were already *Barons* by their Tenure, when they were in Parliament, they had undoubtedly in Consequence of their Writs a Right to vote in all Questions whatsoever, *&c.* As to the Second, they also by Virtue of the Oath of Homage, which every Military Tenant made to his Lord, were oblig'd to attend when summon'd; but then, when they were in Parliament, it may be doubted, whether they had more than a deliberative Voice of Councellors, or, as it is now express'd, whether they were more than as Assistants to the House of Lords. And as to the third, they were not by Law oblig'd to obey the Writ; but yet if they voluntarily chose to attend, they, like the second, were in all Probability no otherwise than as Assistants to the House.

As to the first of these three Sorts of Persons, the Question is not so much, whether they were not, after the Receipt of their Writ, intituled to all the Privileges of Parliamentary *Barons*, as whether there were in Fact, from the Time of *Edward* I's Accession, any Persons who were *Tenants per Baroniam*, and yet had not a Right to demand a Writ of Summons to Parliament. *Elsynge* in his Manner of holding Parliaments does observe (and truly) that it appears by the *Inquisitiones post mortem*, remaining in the Tower, that very much Land was antiently held *per Baroniam*, by Persons who were never summon'd to Parliament; but his Remark, that they were therefore never reputed *Barons*, is not well founded, as appears from the above-cited Cases of Sir *Ralph de Everden*, and *Theobald de Bordmor*, and the *Cornwalls* of *Shropshire*, of whom Sir *Harry Spelman* observes, that they were Unparliamentary *Barons*: "Sed Villa Burford in Com. Salop. re- "peritur per Inquisitionem capt. anno 40 *Ed.* III. te- "neri de Rege ad inveniend' quinque homines pro "Exercitu Walliæ & per *Servitium Baroniæ*, dicuntur- "que inde Domini ejus *Barones de Burford*; sed tamen "in Parliamenta non prodeunt." I think it needless to add any more, but from what has been said an Answer may be given to Justice *Dodderidge*'s Objection, *viz.* that such Manors as are *Tenure per Baroniam*, being alien'd to Common Persons, do not ennoble the Purchasers; for the Purchasers were in Fact *Barons by Tenure*, since no one can doubt, but that their Heirs must have paid Relief, *&c.* as such, but then they had no Right of coming to Parliament, unless they were summon'd by special Writ, in Virtue of the above-mention'd Laws of King *John* and *Henry* III. And the obvious Reason why, in a few Years after *Henry* III. we hear no more of these Unparliamentary *Barons*, is, because that those of them, who had not Interest sufficient to be summon'd to Parliament as *Barons*, (wisely preferring a Share in the Legislature of their Country to the empty Title of a Lord without it,) chose rather to mix themselves silently with the other Commoners of their respective Counties, thereby hoping, when the Knowledge of their Tenure was something lost, to get into Parliament in the House of Commons.——

P. 49.

In Glos.

Of Nobi. p. 86.

During the first Period of Time therefore all *Peerages* or *Baronies* were Feudal; and even the Officiary Titles, as of Lord High-Steward, Earl Marshal of *England*, *&c.* tho' by *Dodderidge* they are reckoned to be of a Species by themselves, were also Feudal. Nor is there any Instance of any Person's being summon'd to Parliament, and acting as a Lord of Parliament, as High-Steward, or Marshal simply, but those Offices were always either annex'd (when they were Hereditary) to Fiefs, or else were bestow'd on Persons who were Tenants of the Crown *per Baroniam*, and might therefore have been summon'd to Parliament, tho' they had never had those Offices. As for Instance, the Office of High-Steward was, as my Lord *Coke* says, annex'd to the *Barony* of *Hinckley*, which was parcel of the County of *Leicester*; that is, as he explains it, the *County* and *Barony* were held by the further Service of executing the Office of High-Steward of *England*; as appears from a Manuscript which he mentions, tho' he quotes nothing out of it, intituled, *Officium Seneschalli Angliæ*; the Passage to which he refers, I suppose, is this, "Modus quo modo & quam Officio uti debet, "ut *tenetur per Servitium & per Sacramentum Homagii*, "& fidelitatis suæ talis est.

4 Inst.

Bibl. Cot. sub Effi.

Vesp. B. 7. fol. 99. b.

Having in this Manner explain'd that first Condition of Men, whom the King had an undoubted Power to summon to his Parliament, and who, when they appear'd, enjoy'd all the Rights of Parliamentary *Barons*; it follows in order to speak of those, who, tho' they were not *Barons by Tenure*, yet by reason of their being *Tenants in Capite by Knight Service*, were oblig'd to attend, when summon'd: But as the Pretensions of these Persons to the full Rights of *Peerage*, are founded upon the same Bottom with those other Persons, who', tho' they were summon'd, were yet under no Obligation to appear, unless they voluntarily thought fit so to do; it may perhaps shorten this Discourse, if we consider them both together.

It being agreed, that our Nobility not only sit in the House of Lords as *Barons*, but also that none but *Barons* have a Right to sit and vote there; and the Persons we now speak of, not being *Barons by Tenure*, it follows, that they can only be so in Virtue of the Writ that summons them thither; for as to the Barons by Patent, it will be necessary to speak of them by

by themſelves. But that the Reader may the better judge how the Writ can operate ſo far as to give the Perſons ſummon'd by it the Right of *Barons* to them and their *Heirs*, it will be proper here to inſert the Writ itſelf. " Rex, &c. N. de N. Chivalier, Quia de " adviſamento & aſſenſu concilii noſtri pro quibuſ- " dam arduis & urgentibus negotiis ſtatum & defenſio- " nem Regni noſtri Angliæ concernentibus, quoddam " Parliamentum noſtrum apud Weſtmon' die " proximo futuro teneri ordinavimus, & " ibidem vobiſcum, ac cum Prælatis, Magnatibus & " Proceribus dicti Regni noſtri colloquium habere & " tractatum: Vobis in fide & Ligeanciâ quibus nobis " tenemini, firmiter injungendo mandamus, quòd con- " ſideratis dictorum Negotiorum arduitate, & peri- " culis imminentibus, ceſſante excuſatione quacunque, " dictis die & loco perſonaliter interſitis nobiſcum, ac " cum Prælatis, Magnatibus ac proceribus ſupradictis, " ſuper dictis Negotiis tractaturi, veſtrumque conſi- " lium impenſuri, & hoc, ſicut nos & honorem no- " ſtrum, ac expeditionem negotiorum prædictorum di- " ligitis, nullatenus omittatis. Teſte, &c.

It has been already mention'd to have been Sir *Edward Coke*'s Opinion, that a *Peerage* was gain'd to a Man and his Heirs, by his being ſummon'd by (or at moſt once appearing in Obedience to) this Writ. Conformable to which Doctrine, Mr. Juſtice *Dodderidge* in his Treatiſe of Nobility puts theſe Queſtions. 1. Whether a Barony, upon a Man's being once ſummon'd by Writ, does deſcend from the Anceſtor to the " Heir ——— And then if to the Heir Female ——— And then if to the Husband of ſuch Heir Female, during her Life ——— All which he reſolves in the Affirmative; but for ſuch Reaſons as (I own) I think do no ways anſwer the Character of the Man's Learning. I hope the Reader will forgive me, if, notwithſtanding the current Opinion to the contrary, I mention ſome Conſiderations which perhaps may make him doubt, whether ('till within theſe few Years paſs'd) the Law was ſo or not. P. 91.

And firſt, as to the Inheritance in the Honor that is ſuppos'd to be gained by it, let any Man but look into the Writ (that can conſtrue it) and he will find it to be entirely perſonal to the Man to whom it is directed, and that it is ſo far from creating a *Barony* to

him and his *Heirs*, that neither the Words *Baron*, *Barony*, nor *Heirs*, are to be found in it. It is agreed, that the King cannot by his Letters Patents create any Man a *Baron* or *Peer*, either for Life, in Tail, or in Fee Simple, without expreſs Words of Creation in the Patents for that Purpoſe. Beyond which, in all the Patents that have paſs'd ſince the 20th of *Hen.* VIII. there is not only a ſpecial Clauſe inſerted for the creating the Patentees *Barons*, *&c.* but alſo for enabling them and their Heirs (according as the Limitation is) to hold and poſſeſs a Seat and Place in Parliament. It may not perhaps be unreaſonable to think, that it ſeems equally neceſſary, that ſpecial Words of Creation ought likewiſe to be inſerted in the Writ, or that otherwiſe the Writ cannot operate ſo as to create a *Baron*: Such as for Inſtance was practis'd in the Caſe of Sir *Henry de Bromflete*, who being ſummon'd to Parliament 27 *Hen.* VI. this Clauſe was inſerted into his Writ; "Volumus enim vos & Hæredes veſtros Maſculos de Corpore veſtro legitimè exeuntes Barones "de Veſcy, exiſtere." Now as this Writ has given great Surprize to many Perſons, by reaſon of its being the only Writ in which ſuch a Clauſe is to be found, I ſhall make ſome Obſervations upon it. It has been already ſaid, that about the 49th or 50th of *Hen.* III. a Law was made (and the above-mention'd Paſſage out of *Cambden*'s Manuſcript is quoted by my Lord *Coke* as an Act of Parliament now in Force) by which it was enacted, that none of the *Tenants per Baroniam*, or *Barons*, who had all a Right to be ſummon'd before, ſhould for the future have Voice in Parliament, but only thoſe that ſhould be ſummon'd by the King's ſpecial Writ. The Conſequence of which was, that the neglected *Barones Minores* ſoon mingled themſelves with the other Commons of their ſeveral Counties, and the Term *Baron* in proceſs of time came to be appropriated only to thoſe *Majores Barones*, who were conſtantly ſummon'd to Parliament, but yet the Tenure of the neglected *Barons* ſtill ſubſiſted. The Peerage of this very Sir *Henry de Bromefleet* is an Inſtance and Proof of it, ſince he was one of thoſe who held *per Baroniam*, but had been neglected to be ſummon'd to Parliament, as appears by the Title of *Veſci*, which he aſſum'd. For *Ivo de Veſci* was one of the *Barons* who were Inſtituted at the Conqueſt, and who had

12 Rep. 70. Ld. Aburgaveny's Caſe.

had married the Daughter and sole Heiress of *William Tyson* a *Saxon*, who was the Son and Heir of *Gilbert Tyson* who was kill'd on *Harold*'s Side, in the Battle against *William* the Conqueror, by which Means he became possess'd of those Lands that were afterwards (upon the additional Services being impos'd) known by the Name of the *Baronies* of *Alnwicke* in *Northumberland* and *Malton* in *Yorkshire*. Now by the Genealogy of the *Vescy*'s, it appears that the Lands and Honors of that Family by Female Heirs came to vest in one *Gilbert de Aton*; And Sir *Henry de Bromflete* was the Son and Heir of *Margaret*, Daughter and Heir of *Anastasia* the Wife of Sir *John Saint John*, Knight, who was Daughter and Heir of *William de Aton*, the Son and Heir of *Gilbert de Aton* last mention'd. Which *Gilbert* and *William de Aton* had indeed been both (but not constantly) summon'd to Parliament, *viz. Gilbert* was summon'd to the Parliaments held 18th of *Ed.* II. to the 1st of *Edward* III. and to the 16th of *Edward* the Third, and *William* was only summon'd to the Parliament held 44°. *Edward* III. and never summon'd to any other Parliaments; Now Sir *Harry de Bromflete* dy'd in the 8th of *Edward* the Fourth, seiz'd (as it appears by the Inquisitions taken) of the above-mention'd Lordship or *Barony* of *Malton*. As this Writ has been hitherto generally suppos'd to have been an Original Creation of a new *Barony*, I hope this digression will be excused, in order to show that no Barony at all was created by it, but that it was only an Exercise of that Power, which (as is before said) the King had of calling any *Tenant per Baroniam* whatsoever to the House of Lords.

Dugd. Baron. Vol. 1. p. 89.

Vol. 2. p. 234.

Rot. claus. 18 Ed. 2. dor. m. 21 idem

1 Ed. 3. p. 1. dor. m. 2. idem

16 Ed. 3. p. 2. dor. m. 38.

Rot. claus. 45 Ed 3. dor. m. 3.

2. It is a known Rule in Law that the King's Grant cannot enure to two Intents, especially when one of them is clearly express'd and the other is not. Now if this Writ of Summons does create any Person a *Baron* or *Peer*, it operates by way of Grant, which must be by the Implication of an Intent, which is not only not express'd, but which is also perfectly foreign to that which is, and which therefore (at least in every Thing but this Writ) cou'd be in Law only intended. For the Intention of the King clearly express'd in the Writ is not to create the Person summon'd a *Baron*, but only to *consult* and *treat* with him concerning the Affairs of the Nation, which certainly may be done without

Plowd. 333-4. Cok. 1 Rep. 48-32. 3 Rep. 73, 74, *&c.*

without his being a *Baron*. " Vobiſcum (by which the Perſon ſummon'd ſeems to be expreſly diſtinguiſh'd from the *Prelates* and *Barons* that follow) " Et cum " Prælatis, Magnatibus, *&c.* colloquium habere & " tractatum." Theſe are the Words of the Writ, and I muſt own that I do not comprehend what Magick there is in them, to make them perform what no Man will pretend to ſay they ſignify. And as to the other Clauſe by which the Perſon is ſummon'd to be Perſonally preſent with the King and Lords, " dictis die " & loco perſonaliter interſitis nobiſcum & cum Præ- " latis, *&c.* veſtrumque conſilium impenſur' *&c.*" The Reader muſt Judge if there is any more force in that than there is in the laſt. Nor is there any Thing more in it than what the Judges, *&c.* are commanded and actually do every Parliament, for they as well as the *Barons or Peers* are conſtantly ſummon'd *ad conſilium impendend'*. Not that I imagine the Judges, (who are agreed to be only ſummon'd as Aſſiſtants to the Houſe;) to be *Barons* of Parliament; but only that thoſe who think other Perſons ſummon'd by Writ, to have been antiently conſider'd as *Barons* of Parliament, wou'd reflect and determine with themſelves, which part of the Writ it is that made them ſo. For if it was the firſt part of the Writ, that runs, " *Vobiſcum ac* " *cum Prælatis, Magnatibus & Proceribus*, &c." that created them *Barons*; How comes it that the Judges are not likewiſe *Barons*? Since in the 49th of *Henry* VI. 12th of *Edward* IV. 22d of *Edward* IV. and indeed in almoſt all their Writs of Summons to Parliament that Clauſe is inſerted. And as to the ſecond Clauſe, that runs, " *Quod* &c. *perſonaliter interſitis*, &c." that alſo is common to the *Judges*, as well as the *Barons*. My Lord *Coke* does in ſeveral Places obſerve, that the Writ of Summons to Parliament is unalterable, otherwiſe than by Authority of Parliament, tho' (perhaps if it was worth while) it might be ſhown that till within this laſt two hundred and fifty Years, there ſcarcely ever was two of them together alike. And indeed he himſelf upon another Occaſion does ſeem to be ſenſible of it. For he ſays, that one of the Differences between the Writs to the *Lords* and the Writs to the *Judges*, was that, that to the Lords did run, " *Quod*— " *interſitis nobiſcum ac cum cæteris Prælatis, Magnatibus*, " *&c.* and was peculiar to the Lords, the Judges being

4 Inſt. 10. & alibi.

4.

ing only ſummon'd, " *Quod interſitis nobiſcum ac cum* " *cæteris de Concilio noſtro*; and yet that Word *cæteris* is not in the Writ, which in the Lord *Aburgaveny*'s Caſe he himſelf commends as excellently well drawn. But however, if it be this ſecond Clauſe that creates them Barons, why then in the 24th of *Edward* the 3d, *William de Shareſhall* and Twelve other Perſons, of whom Four were but Serjeants at Law, were created *Barons*; for their Writ, directly contrary to my Lord *Coke*'s Aſſertion, runs in that Stile which he ſays is peculiar to the Lords of Parliament. Others have thought that the putting in or leaving out of the word *cæteris* was the peculiar Mark of Diſtinction. And yet in the 25th of *Edward* the Firſt, the Judges were ſummon'd by directly the ſame Writ that the Barons of Parliament were. And on the other hand, by a Writ of Prorogation in the 33d Year of *Edward* the Firſt, as alſo by a following Writ of Summons in the ſame Year *&c.* it appears that the Biſhops and Temporal Lords were ſummon'd by Writs that ran " Quod—interſitis nobiſcum ac " cum cæteris de Concilio noſtro." But to conclude this Point, I ſhall only add ſome few Inſtances in ſeveral Reigns of the *Judges* and *Barons* of Parliament being ſummon'd by the very ſame Writs. In the 1ſt of *Edward* II. after the Writs to the *Barons*, the ſame Writs follow to above thirty other Perſons as Aſſiſtants, with this difference only, that the Words " *in* " *Fide & Homagio*, (as at this Day they are conſtantly done) are left out, and the Note at the end of it is remarkable. " Nota quod in hâc ſummonitione Ju- " ſtitiarii ac alii de concilio Domini Regis, intermixti " tunc cum Baronibus." And likewiſe in the 5, 8, 9, 11, 12, 13, 14th of *Edward* II. the ſame Writs are directed to both *Judges* and *Barons*, ſo likewiſe in the 2, 3, 4, 5, 6, 11th, *&c.* of *Edward* III. the ſame Writs are directed to both *Judges* and *Barons*; I cou'd add many more Inſtances, but I think it needleſs. And now if the Direction of the Writ created *Barons*, theſe Gentlemen were all made ſuch, yet the ſame Men were at other Times ſummon'd as the Judges now are to be, but as *de concilio Regis in Parliamento*. It is true however, that from the 47th of *Edward* III the Writs to the *Barons* and *Judges* have been generally different, tho' ſometimes they have been the ſame. But then the difference is ſo ſmall as to Words of Creation, that

12 Rep. Ve. ſum. mon. ad Parliam.

Rot. clauſ. 25 Ed. 1. dor.

Rot. clauſ. 33 Ed. 1. m. 9. 10.

Rot clauſ. 1 Ed. 2. dor. m. 11.

I be-

I believe it wou'd be very difficult for any Man to shew how one shou'd create a *Peer* or *Baron*, and the other shou'd not. And from the Instances I have mention'd, I think it appears that the *Barons* is perfectly distinct from the Writ of Summons, for if it is not, why are not those Persons rank'd among the *Barons*. Since no reason can be given, why the same Writ shou'd make one Man *a Baron* and not another.

3. It has been already observ'd that my Lord *Coke* affirms, that if the King does by Writ summon a Layman to the House of Lords, he cannot refuse the Service. But that if he call'd an Abbot, or any other Regular, he cou'd refuse to serve unless he held *per Baroniam*. But yet the reason of the Law seems to be the same in the Case of a Lay-man, as of an Abbot, *&c.* For every Writ Mandatory, as a Writ of Summons to Parliament is, supposes the Person to whom it is directed, to be under an Obligation to obey it. I am sensible that it may here be objected, there is no fear of any Man's Disobedience, and in Modern Practice it is certainly true. But then it is as true that the Law is not founded upon Modern Usage, but upon antient Custom, when Men were not so Ambitious of being *Barons* as they now are, but were often upon their own request discharg'd from any Service of that Nature. And therefore if a Lay-man who holds not *per Baroniam*, be as much at liberty to refuse his Attendance as a Regular, it follows that the direction of a Writ to him, does not make either him or his Heirs *Barons*, or Lords of Parliament. It is true, that if a Man accepts of a Pattent by which he is created a *Baron*, he by his own Voluntary Acceptance becomes oblig'd for the future to attend in Obedience to all Writs that shall be directed to him. But what makes this Observation something stronger is, that every Lord who being summon'd, absents himself without the King's leave is liable to be Fin'd, which it is unreasonable to suppose he can be, unless he be under a Legal Obligation to obey the Writ. The only reason my Lord *Coke* gives, for a Regular's not being oblig'd to obey the Writ is, because he does not hold *per Baroniam*, which seems to be equally strong in the Case of a Lay-man. The Abbot of St. *James's Northampton* being summon'd in the Twelfth of *Edward* the Second, Petition'd to be discharg'd upon a sug-

Selden's tit. of Honor.

gestion

gestion that he was not a Tenant *per Baroniam*, the Words are, " Non tenet *per Baroniam nec de Rege in Ca-*
" *pite* sed tantum in puram & perpetuam Eleemosy-
" nam, & nec ipse Abbas nec Predecessores sui fuerunt
" ad Parliamentum citati hucusque. *Unde petit Reme-*
" *dium & habuit.*" But here it may be observ'd that this Passage justifies what I before said, that not only the Tenants *per Baroniam*, but also the other *Tenants in Capite*, &c. were oblig'd to attend in Parliament when summon'd. And therefore this Abbot excuses himself as well upon the account of *Nul tenure en chief*, as *Nul tenure per Baroni*. Again in the 26th Year of *Edw.* III. the Abbot of *Leicester* was by Patent under the great Seal upon his Petition and Suggestion that he was not a *Tenant per Baroniam*, discharg'd from all Attendance in Parliament. The Patent is, *per Petitionem de Parliamento*. And first recites as follows, " Supplicavit Rot. Pat.
" nobis Abbas de Leicestriâ ut cum ——aliqua ter- 26 Ed. 3.
" ras vel tenementa de nobis *per Baroniam*, seu alio p. 2 m.
" modo non teneat per quod ad Parliamenta seu consi- 22.
" lia nostra venire teneatur——Nolentes ipsum Ab-
" batem *indebitè sic Vexari*, concessimus quod idem
" Abbas, *&c.* de veniendo ad Parliamentum, *&c.* qui-
" eti sint & exonerati in perpetuum." Now these two Persons being upon this only account discharg'd from their Attendance in Parliament, and the obliging them to attend being styl'd an *undue Vexation*, because they did not hold *per Baroniam*, seems in some measure to be a Proof (the reason in both Cases being the same) that neither a Lay nor Religious Person are oblig'd to attend in Obedience to the Writ, unless they are Tenants *per Baroniam*. But further this Patent to the Abbot of *Leicester*, shows how there came to be so many Clergy summon'd to the Parliament of the 49th of *Hen.* III. as are before-mention'd, and yet not above one third of them either then or afterwards were really *Barons* of Parliament. It is before said, that those who were not Tenants *per Baroniam*, or by *Knight-Service*, &c. might refuse to attend, unless they Voluntarily thought fit so to do. And accordingly it follows in this Patent, by way of reason why the then summons of the Predecessor of the Abbot of *Leicester* shou'd not bind him, that he was Voluntarily summon'd. " Quo anno (scil 49. *H.* 3.) omnes Ab-
" bates & Priores Regni nostri Angliæ ad Parliamen-

" tum ejuſdem Proavi noſtri tunc tentum voluntarie
" ſummoniti fuerunt.

4. But that the Reader may the better judge, how far the Direction of a Writ of Summons to any Man who was not a *Tenant per Baroniam*, cou'd be thought to create him a *Baron* of Parliament, either for Life, or to him and his Heirs, *&c.* I ſhall mention a few Particulars that appear upon view of the Writs of Summons that are extant. If it be true that every Man (tho' he be not a *Baron* either by Tenure or Patent) ought upon the receipt of his Writ to enjoy the Dignity and Honor of a *Baron*; How is it that ſo many Abbots and Priors as were ſummon'd 49°. *Henry* III. were never reckoned among the Spiritual *Barons!* Nor can I think it a ſufficient Anſwer to ſay, that tho' they were *Barons*, yet as *Volenti non fit Injuria*, their *Baronies* were by their own Conſent defeated and taken away, ſince according to a late Reſolution of the Houſe of Lords, tho' a *Peerage* may be forfeited, it cannot by any other Act whatſoever (but an Act of Parliament) be either ſurrendred, defeated or extinguiſh'd. But I ſhall not inſiſt upon what was done during the moſt confus'd part of *Henry* the Third's Reign. In the 18th of *Edward* II. Writs were directed to the Arch-Deacon of *Northampton*, and to the Dean of the Arches *London*, &c. who therefore according to this Rule, ought to have been reckoned among the Spiritual Barons of the Kingdom, tho' no Writs were for ought appears ever directed to them afterwards. The like Inſtances might be given in the Caſes of Guardians of the Spiritualities of Vacant Biſhopricks, Vicars General, *&c.* who have been frequently ſummon'd to Parliament by theſe creating Writs, without its being ever ſuſpected that they were thereby created *Barons*, either for Life or otherwiſe.

Viſc. *Purbeck's* Caſe.

Rot. clauſ. 18 Ed. 2. dor. 5.

4. Inſt. But my Lord C. J. *Coke* further informs us, that every Temporal Lord who Sits in the Houſe, ought *ex debito Juſtitiæ* to have a Writ of Summons directed to him every Parliament. Nor can they therefore by Law, either with or without their Conſents be ever left out of the Liſts of Summons. And the Lords have in all Ages reſented any Omiſſion of that Nature as the higheſt Breach of their Privileges. As in the Year 1255. the *Barons* refus'd to grant any Aid, or to tranſact any Buſineſs, becauſe all the *Barons* were not ſum-

ſummon'd according to the Tenor of *Magna Charta* Matth. Paris.
" Quod omnes tunc temporis non fuerunt juxtà teno-
" rem Magnæ Chartæ ſuæ vocati. Et Ideo ſine Pari-
" bus ſuis tunc abſentibus, nullum voluerunt tunc re-
" ſponſum dare vel Auxilium concedere vel præſtare."
And it was frequent in ſubſequent Parliaments, to prorogue or adjourn for ſome ſhort Time at the beginning of a Seſſion, in order to give Time to ſuch Members of either Houſe as were abſent to arrive, before they wou'd enter into any Buſineſs. I think I need not quote Precedents for what is ſo generally known. Every Reader will doubtleſs believe it Natural that each Houſe ſhou'd concern itſelf for its own Members; but what is more, the Commons when they have thought the Houſe of Lords too thin, tho' the *Peers* acquieſc'd themſelves, have yet refus'd to proceed on Buſineſs, till all thoſe Writs of Summons which of Right ought to have been ſent to the Lords, were actually Iſſued. As for Inſtance in the Rot. Parl. 20th of *Richard* II. The Commons before they wou'd 20 Ric. enter upon the Buſineſs propos'd to them by the 2. n. 8. Chancellor in the King's Name, Petition'd that all the Abſent Biſhops and Lords might be ſent for to Parliament. And of later Times, in the Caſes of the Earls of *Arundel* and *Briſtol*, upon their Confinement, the Ruſhw. Houſe of Lords adjourn'd themſelves from Day to Coll. Day, with a Reſolution not to enter upon any Buſineſs till they had Satisfaction in relation to thoſe two *Peers*. Now if it be admitted for Truth, that the Direction of a Writ of Summons to any Perſon creates him a *Peer* to him and his Heirs, and that every *Peer* has a Right to demand a Writ of Summons to every Parliament; it follows, that every Man to whom ſuch a Writ was ever directed, was thereby created a *Baron* to him and his Heirs, who had conſequently a Right to demand their Writs of Summons. And yet if the Liſts of the Names of thoſe who have been ſummon'd to Parliament be conſider'd; it will not be very eaſy to conceive how the Notion of a Writ's creating a *Peerage* in *Fee* ever came into the World. For from the 49th of *Henry* III. to the 23d of *Edward* IV. (from which Time the Summons have been more regular) not fewer than 98 Lay-men have been ſummon'd to Parliament one ſingle Time, by the very ſame Writs by which the Earls and the other undoubted Barons

were ſummon'd, and yet neither themſelves nor any of their Name or Poſterity, were ever afterwards ſummon'd to any Parliament or Great Council. Now is it poſſible, if theſe Gentlemen had by their being thus once ſummon'd gain'd a *Peerage* in Fee, that the Houſe of Lords, ſo juſtly Jealous of its Liberties, and ſo conſtantly ready to vindicate the Rights of any one of its injur'd Members, ſhould paſs over in Silence the Omiſſion in all future Writs of Summons of ſo many rightful *Barons*? And is it conceivable, that ſo many Barons and their reſpective Heirs ſhould never complain of ſuch an Injury, nor ever put in a Claim to their *Unextinguiſhable Baronies*? What therefore can be concluded from ſuch Facts? ——— If their Writs did not create them *Barons*, they could only be ſummon'd as Aſſiſtants to the Houſe of Lords, and as *de Concilio Regis in Parliamento.*

But here it will be uſeful to recollect what has been before obſerv'd, *viz.* That the whole of Parliamentary Buſineſs may be reduc'd under the two general Heads of *Advice* and *Conſent*. Every *Tenant by Knight-Service*, as well as *per Baroniam*, did owe Homage to the Lord of whom he held his Lands; and the Oath of Homage did comprehend in it, that the Tenant was obliged to give to his Lord the beſt Counſel and Advice he was able, and alſo that he ſhould keep ſecret all ſuch Counſels as ſhould be communicated to him, which by the Way is one Reaſon why all *Fiefs* were Originally Maſculine, and could not deſcend to the Heirs Female.

Lib. Feu. Tit. 1. "Hoc autem notandum eſt, quod licet filiæ, ut Maſculi, Patribus ſuccedant, Legibus tamen a Succeſſione feudi removentur." Of which Law *Zaſius*, a very conſiderable Feudal Writer, affirms the Reaſon to be, that by Intendment of Law a Woman was incapable of keeping a Secret, and therefore could not ſucceed to a *Fief*. Now the Tenants *in Capite* of the Crown, who were oblig'd to ſwear Homage, were either Tenants *per Comitatum, Baroniam, &c.* or by *Knight-Service*, and who, by Virtue of their Homage, (as is before ſaid) were equally oblig'd to attend when ſummon'd to Parliament: The Difference therefore that there was between them aroſe from the Difference of their *Tenure*; and as they could not be *Peers* to each other, by reaſon that they were not *per idem Servitium Convaſſalli*, it ſeems reaſonable to conclude, that their

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Buſineſs and Rights in Parliament were different. In Matters of meer Advice to the King, the *Tenants per Baroniam* and by *Knight-Service* might act indifferently together, but when any thing was demanded of the *Barons properly ſuch*, I cannot but think the *Tenants by Knight-Service* acted only as Council to the King, to adviſe him in the Management of his Affairs; ſince it ſeems to be abſurd to imagine, that in Caſes like that of 13 *Ed.* III. when the *Barons* granted the Tythe of the Grain, *&c.* growing upon the Demeſne of their *Baronies*, the *Barons* would ſuffer the King to call by Writ a Poſſe of Tenants by Knight-Service, or other Perſons who were no ways concern'd in the Payment, to vote a Tax upon others, who held *per Baroniam*.

In other Affairs likewiſe which might be mention'd, wherein the *Barons* acted as the *Regalis Curia Regis Angliæ*, it ſeems reaſonable to believe, that thoſe Tenants by Knight-Service only, *&c.* who by Writ were ſummon'd to Parliament, were conſider'd only (as the Judges at this Day are) as Counſellors to the King and *Barons*. If what I have now ſaid be thought true, in relation to the Tenants by Knight-Service who were oblig'd to attend when ſummon'd, it is much more ſo, in relation to the third Species of Men, who could only be *Voluntariè ſummoniti* But before I proceed any further, I ſhall ſhortly examine whether the Facts of Parliamentary Hiſtory will anſwer to this Notion.

And firſt, to reflect only upon what has been already ſaid: This ſeems to be the only way of accounting for the *Barons or Lords* having never taken Exceptions to the King's ſummoning ſo great a Number of Men only once to ſerve in Parliament, and then omitting them and ther Heirs for ever after: Which it is impoſſible ſhould not have been done, had the Perſons ſummon'd been thereby really created *Barons*. But upon Conſideration of the Liſts of Summons this further Remark may be made, that theſe Perſons were always treated exactly in the ſame manner as the Judges and Serjeants were, who were yet never ſuſpected by Virtue of their Writs to have been created *Barons*. And as to them every one knows, that they were never antiently either regularly or conſtantly ſummon'd; the King always, by ſpecial Writs, ſummoning only ſuch and ſo many of them, whoſe Coun-

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ſel and Advice he thought fit to uſe. And therefore it ſometimes happen'd, that if the King had no great Opinion of their Capacities, or thought the Advice of other People might be more uſeful to his Affairs, he would neglect them all. As for Inſtance, *Edw.* I. in the 28th Year of his Reign, tho' he did not neglect his Judges, yet Writs were directed to the two Univerſities, commanding them to ſend ſome of their beſt Civilians to adviſe the King in Parliament; "Rex, &c. "Cancellar' & Univerſitat' Oxon' Vobis mandamus, "&c. Quod quatuor vel quinque de diſcretioribus & "in jure ſcripto magis expertis Univerſitat' prædict' "ad Parliamentum noſtrum apud Lincoln' mittatis, "&c. But however, as the Judges and thoſe other Perſons, who were ſummon'd only as Aſſiſtants to the King and Lords in Parliament, never pretended, that, becauſe the ſame Writs were ſometimes directed to them as to the *Barons*, therefore they were thereby created *Barons*: The Lords never concern'd themſelves at their being (according to the King's Pleaſure) ſometimes ſummon'd to Parliament, and at other times totally left out; ſince as thoſe Men, by not being actually *Barons*, had not a Right of Voting among them in Matters of *Conſent*, (as *e.g.* in Grants of Aids, Alterations of Laws, *&c.*) the Lords were no ways intereſted, and therefore could not attempt to interpoſe in relation to ſuch Perſons as the King thought fit to ſummon, to adviſe and conſult with, as to his granting or not granting the Royal Aſſent to any thing that might be propos'd to him in Parliament.

Rot. Cla. 28 Ed. 1. dorſ. 3.

Now if we ſee other Perſons ſummon'd in the ſame manner as the Judges were, or if poſſible in a worſe, that is, at the diſtance of ſeveral Years, and ſeveral Parliaments one time from the other, and this without any Complaint of their being thus either ſummon'd or left out, is it not reaſonable to conclude, that their Buſineſs likewiſe in Parliament was only as Aſſiſtants, in the ſame manner as the Judges are by all allow'd to be? For during the ſame Period of time which we laſt mention'd, that is from 49 *Hen.* III. to 23 *Ed.* IV. there were no leſs than fifty Perſons ſummon'd in that manner by general Writs, and their Names liſted (as frequently the Names of the Judges were) among the Temporal *Barons*: As for Example, *William de Aldeburghe*, *Nicholas de Stapleton*, and many other Perſons who

who might be nam'd, were ſummon'd to ſeveral Parliaments, by ſpecial Writs, not immediately ſucceeding each other, but at a Diſtance of Years, during which many Parliaments had interven'd, to which neither of them had been ſummon'd, and then at laſt totally left out, and none of their Poſterity have been ever ſummon'd ſince. *William de Aldeburghe* was ſummon'd to the Parliaments held *Annis* 44, 49, 50. of *Edward* III. but was omitted in the Parliaments of 45, 46, *&* *iterum* 46, *&* 47. of *Edward* III. And *Nicholas de Stapleton* (whoſe Father had been indeed ſummon'd 6, and 7. *Edw.* II. and died in the eighth Year of that King's Reign, leaving his Son of full Age) was yet never ſummon'd to Parliament 'till 16 *Edw.* III. and dying in the ſeventeenth left his Son *Miles* of full Age, who however was not ſummon'd to Parliament 'till the 32 *Edw.* III. (It ſeems *Dugdale* could not find the Bundle of this Year, ſince in his Summons to Parliament he makes this Note, *Nullæ Summonitiones in annis* 32, *&* 33.) and then was never ſummon'd more, tho' he liv'd until 47 *Edw.* III. nor any of his Poſterity, tho' he left Heirs. So likewiſe *John Strivelin* was ſummon'd, as *Dugdale* ſays in his Baronage, from the 16th to the 44th of *Edward* III. incluſive, but in Fact, according to his own Liſts of Summons, he was only ſummon'd *in Annis* 16, 37, 38, 39, 42, *&* 44 *Edw.* III. I think it needleſs to incumber the Reader with more Caſes to this Purpoſe, ſince every Man upon once looking upon the Liſts of Summons may obſerve Numbers of them.

Dug. Bar. Vol. 1. p. 70.

From all theſe Particulars therefore, and much more that might be added, it ſeems reaſonable to believe, that as the King's Writ to the Judges did not conſtitute either them or their Heirs *Peers* or *Barons* of the Realm, ſo neither did the ſame Writ, directed to any other Perſons, create them *Peers* or *Barons*, either for Life or otherwiſe, unleſs they were ſuch as were Tenants *per Baroniam*, and had been neglected as being *inter Barones Minores*, as is before obſerv'd. But what has now been ſaid will not appear ſo ſurprizing, if it be conſider'd, that the Judges did formerly make a much greater Figure in Parliament than they now do; for when the Commons contented themſelves with Petitioning, and the Lords with Anſwering, leaving it to the Judges to draw their Petitions and Anſwers into

into the Form of Statutes, they were in some manner concern'd in the Legislature of the Kingdom. Many Particulars might be mention'd upon this Occasion, but I for shortness omit them, tho' however it ought to be observ'd, that it is very difficult from old Books which mention the Transactions in Parliament, and the Names of the Persons mostly concern'd, (tho' doubtless it was well known at the time of Action) at this time to distinguish the real *Barons* from those who were only as Assistants in Parliament. And besides, it was usual formerly when any matter was under Consideration in the House of Lords, to commit it indifferently to any Persons who were summon'd to the House, without distinguishing who were or who were not *Barons*. The modelling or contriving a Bill, *&c.* in Parliament being altogether matter of Advice, was therefore common to all who (like the Judges) were by the Clause *Vestrumque Consilium impensuri*, summon'd to give Councel and Advice to the King. But then (as I think) when they came to Resolve upon the Bill's, *&c.* passing, which is purely matter of *Consent*, none had the Right of voting but those who were actually *Barons*. The Usage at this Day is for the House of Lords to refer Business by Order, to the Judges, who report to the House their Opinion concerning it. But formerly the Judges have been made joint-Committees with the Lords, and that so late as the Reign of Queen *Elizabeth*; for 26 *Jan.* 1563. the Bill against forging Evidences, *&c.* was committed to the Archbishop of *York*, the Duke of *Norfolk*, the Marques of *Northampton*, *&c.* to the Chief Justice of the Queen's Bench, the Chief Baron of the Exchequer, and to the Queen's Sollicitor. On the 20th of *March* following, the like Case again happen'd; and indeed it was very frequently practis'd in all her Parliaments, until the 39th Year of her Reign, from which time, tho' I cannot pretend to tell the Reason, it has been disus'd. Now according to the Notions and Practice of the present Age (did we not certainly know how things stood in the Reign of Queen *Elizabeth*) we shou'd without hesitation conclude all Joint-Committees to be Peers, and therefore we ought much less, when the Question is concerning much more antient times, and of which no Journal Books are extant, to fancy that all Men who were summon'd by Writ to

Journal Dom' Proc. 1563.

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Parliament, were equally Peers of the Kingdom, when in Fact some who were summon'd by those Writs, are agreed never to have been thought such. And therefore, if it be true, that if the Writ makes one Man a *Baron*, it must also make every Man so to whom it is directed, and that being manifestly not true in respect to the Judges, *&c.* it from thence follows, that a *Barony* is something distinct from the Writ, and that can only be *Tenure per Baroniam*.

But lastly, that we may not too long insist upon these *Barons* by Writ, it shall be observ'd, that tho' the common Notion is otherwise, yet even Modern Practice has not been so inconsistent with what has been before explain'd, as is generally imagin'd. But here it will be proper to take notice, that a Distinction must at this Day be made between the Persons to whom these Writs are directed; for they are either to the elder Sons of Peers, who are summon'd by the Title of some *Barony* actually in the Father, or else they are directed to Commoners who have no Right of Succession to any Peerage whatsoever. And as to the last of these Persons, there is no doubt, but that if the Writ does any thing, it must operate by way of Creation; but as to the first, even as the Law is now suppos'd to stand, some Doubt may be made of it. Every Peer in the House of Lords has Precedence according to the Seniority of his Creation; now it is obvious, that if the Writ does in both Cases equally operate by way of Creation, that then the eldest Son of a Peer, as well as any other Commoner, when he is by Writ summon'd to Parliament, would be the *puisne Baron*, and wou'd consequently give place to all others, yet the Usage of the House of Lords is contrary: For if the Eldest Son of a Peer be summon'd by Writ, it is generally by the Stile of some *Barony* that is in his Father; and his Place in the House is regulated according to the Antiquity of that *Barony*: As for Instance, suppose the eldest Son of a Duke of *Norfolk* be summon'd by the Title of Lord *Mowbray*, his Place on the *Barons* Bench is that of the antient *Barons* of *Mowbray*; and accordingly in the Lists of Summons of the 32d of *Charles* II. *Henry Howard*, Lord *Mowbray*, is plac'd as the first Baron of *England*, which is in such Case suppos'd, by the Consent of the Father, to be vested in the Son. The Writ of

Summons therefore seems not so much to be consider'd as the Creation of a *Baron*, but only as an *Instrument of Conveyance*, or Method of transferring a *Barony* or *Honor* from one Person to another; for if it is not so, what Reason can be given, why the Eldest Son of one Earl, summon'd by the Style of his Father's *Barony*, shall have Precedence according to the Rank and Antiquity of that *Barony*? And that the Eldest Son of another Earl, if he be by Patent created to a Title or *Barony* foreign to his Family, shall be consider'd as the Youngest *Baron*, and take his Place in the House accordingly. I speak (and I think every Man ought) with great Submission upon this Subject; but (if I mistake not) the Law even at this Day is, that tho' the last of these Persons takes a *Barony* in Fee, or otherwise, according to the Limitation of it, yet the first, upon whom the Writ operates only by way of Instrument of Conveyance, has no other Title in the *Barony* than his Father had, from whom it was convey'd; and therefore if the Father has only an Estayle, Tayle, *&c.* in the *Barony*, the Estate of the Son, tho' summon'd by Writ, is not enlarg'd, nor made a Fee, and descendible to his Heirs general. Now it cannot be pretended (as I have sometimes heard) that as the Eldest Son of a *Duke*, *&c.* does out of Parliament take Place of a *Baron*, when he is summon'd to Parliament, the *Barons* for that Reason yield Precedence to him in the House; for if that was the Case, he would likewise in Parliament take place of all the Viscounts and Earls, which is never done; according to the Resolution *6 Hen.* VIII. in the Case of the Earl of *Surry*, who pretending to take Place in Parliament above all the Earls, as Son to the Duke of *Norfolk*, it was resolv'd that he should be rank'd only according to the time of his being created Earl of *Surry*. If the Writ was therefore to be consider'd as creatory of a new *Barony*, it seems more than probable, that a like Resolution would have been taken for ranking the Person summon'd among the *Barons* according to the time of his Creation: Which not being done, manifestly shows the Writ to be no more than an Instrument of Conveyance; for there can be no more Reason for the Eldest Son of a Duke's taking place of the *Barons*, when he is created a *Baron*, than there is for his taking place of the Earls, when he is created an Earl.

Journal Dom' Prov'

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When therefore the eldeſt Son of a Nobleman is ſummon'd to the Houſe of Peers, by the Title of his Father's *Barony*, there is not a new *Barony* created; but by the Operation of the Writ, according to the Cuſtom of Parliament (which is part of the Law of the Land) the *Barony* of the Father is transferr'd to the Son: From whence (if this Notion be true) it evidently appears, that the Number of *Barons* in Fee is not near ſo large, as it has been by ſome late Writers repreſented to be, upon an Imagination that the Eldeſt Sons of Peers, when they are by Writ ſummon'd to Parliament, by the Style of their Fathers *Baronies*, do thereby gain an Eſtate in Fee-Simple in the Honor, ſo as to make it deſcendible to their Heirs general, and that conſequently their Peerages are not ſo liable to be extinguiſh'd, as they were before. But here it will not be improper to obviate an Objection that may be made, *viz.* That ſince all the Peers are agreed to ſit and vote in the Houſe only as *Barons*, the Writ cannot operate by way of Conveyance of the Father's *Barony* to the Son; becauſe that, if it did, the Father would have no *Barony* left whereby he could be intitled to ſit in the Houſe, and that therefore the Writ muſt operate by way of Creation. In Anſwer to which it muſt be obſerv'd, that a Diſtinction is to be made between the Writ's being directed to the Eldeſt Son of an *Earl*, *&c.* and to the Eldeſt Son of a *Baron*; for as I take it, tho' an Earl be poſſeſs'd of only one *Barony*, yet may his Eldeſt Son be ſummon'd by that Title, and the Father ſtill retain in himſelf all the Rights of *Barony*: But a *Baron* muſt regularly have ſeveral *Baronies* centring in him to enable his Eldeſt Son to be call'd by Writ, becauſe that in ſuch Caſe, tho' one of them be transferr'd to the Son, yet a *Barony* does ſtill actually remain in the Father. That *Earldoms* as well as *Baronies* were originally Feudal, is certain; and every Tenure *per Comitatum* was to a *Tenure per Baroniam*, exactly as a *Tenure per Baroniam* was to *Knight-Service*; and therefore as every *Tenure per Baroniam* was a *Tenure by Knight-Service* and more, ſo likewiſe was a Tenure *per Comitatum* a *Tenure per Baroniam* and more, that is, as a *Tenure per Baroniam* imply'd *Knight-Service*, a Tenure *per Comitatum* did imply *Barony*: From whence a Reaſon may be gather'd of this Difference; for tho' the ſingle (perhaps) *Barony*

of an *Earl* be transferr'd to the Son, yet the *Earldom*, which implys a *Barony*, ſtill remains in the Father; and ſo was it underſtood in Antiquity, ſince the Word *Honor*, which as is before obſerv'd was Synonymous to *Barony*, was in the ſame Feudal Senſe apply'd to *Earldoms*, with this only Diſtinction, that it was call'd *Comitalis Honor*, as appears from this, that in the old Charters for the Creation of *Earls*, beſides the Annuity which was to be paid to them *nomine Comitatûs*, it was frequent to add a Clauſe to enable them to hold a great part of their Eſtates *ſub Comitali Honore*; by which thoſe Lands became, as it were, parcel of their *Earldoms*, which was the beſt way of Entailing, ſince thereby they became like their *Honors*, unalienable by their Heirs. As for Inſtance (not to multiply Precedents) in the Patent that paſs'd for creating *Henry Piercy* Earl of *Northumberland*, this Clauſe is inſerted, after the Grant of Twenty Pounds *nomine Comitatûs*; "Et quod omnia "Caſtra, &c. quæ ——— Jure Hæreditario vel adquiſitione propriâ peranteà tenuit & poſſedit, vel "impoſterum eſt habiturus ſub *Honore Comitali*, & tanquam parcellæ dicti Comitatûs teneantur, &c." But further, the Practice has been conformable to this Notion, tho' by the way it may be obſerv'd, that this Practice is not of a very old Date, ſince the firſt Inſtance of it was (if I am not much deceiv'd) in the 22d of *Ed.* IV. in favour of *Thomas Arundell*, Eldeſt Son to *Richard Fitz-Alan* Earl of *Arundel*, who was ſummon'd to Parliament by the Name of Lord *Maltravers*, and in his Caſe (which perhaps was the Foundation of their after Uſage) he is not placed as junior *Baron* upon the Liſts of Summons, but between the Lords *Zouch* and *Dacre* of *Gilleſland*; but as they were not then probably ſo nice in entring the Names of the *Peers* as they have been of later times, I ſhall not offer to infer any thing from it. The Summoning the Eldeſt Sons of Earls by Writ is ſo common, that it is needleſs to mention any of them; but the Eldeſt Sons of *Barons* have very rarely had that *Honor*, there being I believe but two, who were ever ſummon'd by Writ, both whoſe Fathers at the ſame time had in them ſeveral *Baronies*; the firſt of whom was *Will. Parker*, the Eldeſt Son of *Edward* Lord *Morly* and *Montegle*, by the Name of Lord *Montegle*, and in the Liſts of Summons he

Rot. Ch. 1 Ri. 2. n. 31.

Summ. 1 Jac. Re. 1.

he is plac'd between the Lords *Darcie de Darcie* and *Sandys de Vyne*. The second was *Conyers Darcie*, Eldest Son of the Lord *Darcie*, *Meynill*, and *Conyers*, by the Name of Lord *Darcie*, and was upon his first Summons, which was *anno* 32 *Caroli* II. (I suppose thro' Mistake) plac'd as junior *Baron* upon the List; but in the Parliament of 1 *Jac* II. that Error is amended, for he is then entred between the Lords *Stourton* and *Cromwell*.

As to the Commoners to whom Writs have likewise been directed (unless they were some of the before-mention'd neglected *barons by Tenure*,) there is no doubt but their Writs, if they became *Peers* in consequence of them, must have operated by way of Creation. But then it strongly appears, that that Method has not been much esteem'd; for (as I believe) it is now above a hundred Years since any Man was made a *Peer* by that means; and as to those who are suppos'd to have been created *Barons* by Writ before that time, it must be observ'd that all the antient Writs of Summons did constantly run "in Fide & Homagio "quibus nobis tenemini;" as *Dugdale* and all other Authors agree. But during the time that Phrase was us'd, my Lord *Coke* and Sir *Henry Spelman* both assert the Persons summon'd to Parliament as Peers, to have been undoubtedly *Barons* only by Tenure: And therefore (if that Observation be allow'd to be true) it demonstrably follows, that there could not possibly be any *Barons* by Writ, in the Sense the Term is now us'd, before the 25th of *Edward* III. since all the Writs antecedent to that time have that Phrase regularly inserted in them: Tho' if we consider what has been before observ'd, that Homage was equally incident to a *Tenure per Baroniam*, and by common *Knight-Service*, and therefore the Writ might with the same Propriety be directed to them both, it manifestly appears, that the Direction of such a Writ to any Man does not prove him to be a *Baron* at all, since it only supposes him to be a Tenant *in Capite* by one of the above-mention'd Services: And as to what my Lord Chief-Justice *Coke* further observes, that the Reason of changing that Clause into the other of *in Fide & Ligeancid*, was, because the greatest part of the Persons summon'd after the 25th of *Ed.* III. were not Tenants *per Baroniam*, I cannot but doubt the Truth of it, since I believe no Man can show, that ever any Man

4 Inst. & in Glos.

was

was summon'd to Parliament by Writ, from the 49th of *Henry* III. until the 1st of *Henry* VII. who was not a Tenant *per Baroniam*, or at least in *Capite* by *Knight-Service*, and Consequently the Phrase *in Fide & Homagio*, was as applicable to every Man who was summon'd after the 25th of *Edward* III. as it was before.

But indeed after that Time the Phrases seem to have been us'd indifferently, and as if they were Synonymous to each other. For sometimes the one Phrase and sometimes the other, are to be found in Writs directed to Persons, who were undoubtedly *Barons by Tenure*. And then farther, since that Time frequent Homages for *Dutchies*, *Earldoms* and *Baronies* are upon Record, to have been done by Persons who were at other Times summon'd by the Phrase, *In Fide & Homagio*. The Ceremony of it is kept up unto this Day, when upon a Coronation the *Peers* in a Body, are said to do *Homage* to the King. The Bishops are now the only [illegible] who regularly do it upon Livery of their Temporalities, before they are admitted into the House of Lords.

Having in this Manner, as fully as the Limits prescrib'd to this Discourse wou'd permit, laid down my Thoughts concerning *Barons* or *Peers*, both by *Tenure* and by *Writ*; It will be necessary before I can proceed to the Consideration of *Peers* by *Patent*, to premise something concerning that Prerogative, which the Crown has sometimes claim'd, not only of summoning those Persons to Parliament (as his Council) who were Tenants in *Capite* by *Knight-Service*, once or twice, and then neglecting them for the future, but also of Summoning in the same Manner, those who were actually Tenants *per Baroniam*, sometimes to one Parliament and sometimes to another, and leaving them out of the Bills of Summons afterwards, whenever the King thought Convenient.

It has been already observ'd, that Attendance in Parliament, was Originally to be in a great Measure consider'd, as a Service incident to the Tenure of Lands. And that upon the Defeat of the *Barons* at *Evesham*, a Law was made by which no *Baron* had a Right to come to Parliament, unless he was summon'd by particular Writ; Which as it was the Occasion of what was afterwards call'd *Barony by Writ*, so likewise the Practice which was for sometime afterwards us'd,

in Summoning the *Barons* to Parliament, was probably the Cause of Introducing *Barons* by *Patent*. The Clause in the above-mention'd *Magna Charta* of King *John* is, "*Ad habendum commune consilium Regni*, "*faciemus* summoneri *Archiepiscopos*, *Episcopos*, "*Abbates*, *Comites*, & *Majores Barones Regni* sigilla-"tim per litteras nostras." In which it is observable, that tho' the Archbishops, Bishops, Abbots and Earls, are ordered to be constantly summon'd to Parliament, yet the Summoning of the *Barons* was left in some Uncertainty, by reason of its not being determin'd who shou'd, or who shou'd not be comprehended within the term of *Majores Barones*, which Uncertainty was perhaps the Occasion of those Disputes, that afterwards happen'd between the [illegible] the *Barons*, upon [illegible] that all the *Majores Barones* were not summon'd. But however this Dispute, if the Manuscript Author before cited out of *Cambden* be depended to be true, was by the Statute of *Henry* the Third's Parliament determin'd very much to the Advantage of the Crown, as appears by the Words before transcribed. By which (Statute as my Lord *Coke* calls it) it was enacted, that no *Earls*, or *Barons* indefinitely shou'd come to Parliament, but only those to whom the King shou'd direct particular Writs of Summons; by which Law it was pretended, that the determination of who were, or who were not, to be reckoned *inter Majores Barones*, was left absolutely in the Power of the Crown. But the King's Successors to *Hen.* III. carry'd it yet further, Explaining by it the Charter of King *John*; and claiming a Power to Summon *ad Arbitrium*, any *Tenant per Baroniam* to Parliament, without being by Law oblig'd to Summon him to any future Parliament; and the Writ accordingly (as is before observ'd) contains no Words in it, by which it was antiently understood that the Person summon'd, was created a *Parliamentary Baron* for Life, and much less to him and his Heirs. Thus *Henry Ferrers* is upon the Lists, as being once summon'd to Parliament in the 32d of *Edward* III. and was never summon'd again, tho' there were no less than four of that Name, who before the 49th of *Henry* III. were Tenants *per Baroniam*; so likewise *John de Vesci* was summon'd *inter Majores Barones* 49°. *Henry* III. (and whose *Barony* by *Tenure* is before-mention'd to have descended to Sir *Henry de Grandison*) but whether

Dor. 14. apud Prynne.

whether he was ever summon'd again is uncertain, by reason the Rolls of Summons until his Death, which was in the 17th of *Edward* the First, are lost; however his Brother and Heir *William*, tho' forty Years of Age at the Death of *John*, was not summon'd until the 23d of *Edward* I. and was then not summon'd again until the 6th of *Edward* II, *&c.* many Instances of this Nature might be added, but these are sufficient to let the Reader see, that the King not only claim'd, but also practis'd this Prerogative. But then it must be consider'd, that the least considerable of the *Barons* were always the Subjects of it, for there is no Instance of any *Earls* being ever omitted, nor indeed any very Considerable *Baron*. And they as they were the only Persons who cou'd distress the King, (being sure so long as their Power continu'd of being summon'd themselves) never concern'd themselves to remedy or redress the Injuries done to Persons of less Consequence, until they also began to be affected. And as for the others, they wou'd not complain, since during the first and middle Ages of our Monarchy, (and before that Methods were found out to make Men think a long and expensive Attendance worth their while) the Privilege of attending now and then in Parliament, was not (nor cou'd it be) thought by a Man of a small Income to be a sufficient Equivalent, for the Burthen of those other Services, that were Incident to a *Tenure per Baroniam*.

The Humor of our *English* Gentlemen, is certainly very much chang'd from what it antiently was; since formerly, Men were so far from being fond of coming to Parliament, that even those who were actually summon'd, and by Virtue of their being Tenants in *Capite per Baroniam*, were oblig'd to attend, did so frequently absent themselves, that it was found necessary to pass an Act of Parliament, more effectually to force People to attend in Obedience to their Summons. And therefore it is enacted by the 5th of *Richard* the Second, "That if any Person, which "from henceforth shall have the said Summons, be "he Arch-Bishop, Bishop, Abbot, Prior, Duke, Earl, "or Baron, *&c.* do absent himself——he shall be "amerc'd and otherwise punish'd, *&c.*" It is no Wonder therefore that it was Common for Persons who were not considerable enough to dispute with

Cap. 4.

the Crown upon their being either inserted or left out of the Writs of Summons to Parliament, or who, tho' they might be summon'd, were not (upon other Accounts) very desirous of that Honour, to do all that lay in their Power, to suppress so much as the very Knowledge of their being *Tenants in Capite per Baroniam*. For those Tenants *per Baroniam*, who were never summon'd to Parliament as they were (as is before mention'd) entituled to all the Privileges of *Barons*, as *e. g.* Exemption from serving on Juries, *&c.* which were not simply Incident to, and the pure Consequence of Attendance in Parliament, as *e. g.* their Domesticks being in Session Time free from Arrests, *&c.* so likewise were they bound to the performance of all *Personal* Services whatsoever, excepting only that of Attendance in Parliament.

It is known that the Relief of *Earldoms* and *Baronies*, was uncertain until the Time of the Grand Charter. As appears from *Glanvill*, "Dicitur ratio- Mag. Chart. cap. 2. "nabile Relevium alicujus juxtà consuetudinem Reg- Lib 9. "ni de feodo unius Militis C. solid——de Baro- cap. 4. "niis vero nihil certum statutum est." But yet notwithstanding that by the Charter of *Henry* III. the Relief of an *Earl* was setled at one hundred Pounds, and the Relief of a *Baron* at one hundred Marks, after that Time the *Barons* did frequently pay their Reliefs at one hundred Pounds. As for Example, in the Case of *William Longespeye*, Son and Heir of *Ydonea*, a Tenant *per Baroniam*, "Et postea scrutatis Rotulis de Mem in "Scaccario inveniebatur quod prædicta Ydonea te- Scacc. "nuit de Rege in Capite duas Baronias——Et 40 H. 3. "ideo consideratum est per Barones, quod prædictus Rot. 12. b. "Willielmus respondeat Domino Regi de 200 lib. pro "Relevio suo." Now the Payment of this Relief was Common to all the Tenants *per Baroniam* (who were consequently all Equally *Barons* within the Charter of *Henry* the Third) without distinction whether they were summon'd to Parliament or not. But that it may not be said this hundred Pound Relief paid by *William Longespey*, was in the Confus'd Time of *Henry* the Third, I add, that in the Reign of *Edward* the First (our English *Justinian*, as he is call'd by my Lord C. J. *Coke*) the like Relief, contrary to the express Terms of *Magna Charta*, was paid, "Robertus

Mich. Commu- nia, 14 Ed. 1. Rot 1. a. in bund. 13. & 14 Ed. 1.

" filius Walteri qui habet in Uxorem Dervergullam " unam filiarum & Hæredum Johannis de Burgo filii " & Hæredis Hawisiæ de Launvaley, quæ de Rege " tenuit in Capite per Baroniam, dat Regi quinqua- " ginta Libras pro Relevio suo de Medietate Baroniæ " prædictæ." But this last Case does not only prove that in the Reign of *Edward* the First, one hundred Pound was paid for Relief instead of one hundred Marks, but also that it was paid by Persons who were not (at least regularly) summon'd to Parliament; for this *Robert Fitz Walter* was not summon'd until the 23d of *Edward* the First, that is nine Years after this Payment. Since in the Year preceding, *viz.* the 22d of *Edward* the First, his Name is not to be found upon the List of Summons.

I believe I need not multiply Precedents to prove this Point, since the Reader will easily believe, that tho' the King was willing enough not to be troubled with more of them in Parliament, than such as he shou'd think particularly to summon by Writ, that yet he was not inclin'd to release to those Tenants *per Baroniam*, whom he did not summon, any part of their other *Baronial* Services, nor (much less) to relinquish any Method which the Crown was possess'd of, for raising Money from them. As it wou'd swell this Discourse to too great a Length, I wave the entring into the detail of those Reasons, which might engage all those Tenants *per Baroniam*, who had no Prospect of being regularly summon'd to Parliament, *inter Barones Majores*, or who if they were now and then summon'd, the very Attendance even in Parliament, was a Burthen to them, to desire the Extinguishment of so much as the Knowledge of their being *Tenants per Baroniam*, and to be consequently deliver'd from all those burthensom Services that were Incident to that Tenure.——

As this Prerogative therefore which the King exercis'd of Summoning a Man as a *Baron* for two or three Parliaments, and then, *ad arbitrium*, to leave him out of the Lists of Summons for the future; inclin'd the Indigent and every way *minores Barones*, to get rid of their *Tenure per Baroniam*, so on the other Hand it engag'd the *Barons* of better Fortunes, and more Powerful Families, to think of some Method to prevent their being neglected, and to engage the Crown in such a Manner

Manner as that, without disputing the Legality of the above-mention'd Prerogative, the King might be under a Legal Necessity of Constantly summoning them to all Parliaments. And this perhaps was the first Original of Patents: Which they understood to be (as it were) in the Nature of a Recognition upon Record on the part of the Crown, of their being *Inter Majores Barones*, and that consequently they had a Right to be constantly summon'd to all Parliaments. But however, as this is a Speculation that I can only mention as probable, having not seen Facts sufficient to enable me to evince the Truth of it, I shall not now say more of it; but proceed to what I think more certain in relation to our *Barons* by *Patent*.

And under this Head likewise of Barons by Patent, my first Enquiry will terminate at the Beginning of the Reign of *Henry* the Seventh, since it will be necessary for me afterwards to take some short notice of those Alterations, which since his Time have been introduc'd into the *Peerage*; and of which he laid the first Foundations, and some of his Successors have practis'd in such a Manner as that they have become a Grievance. But as to the Patents that pass'd before the Accession of *Henry* the Seventh, (most of which that are extant, or else attested Copies of them, taken from and collated with the Records, I have both seen and perus'd) this Preliminary Observation and Distinction must be made, *viz.* That they are either Patents creating Persons who were *Barons* before, *Viscounts* or *Earls*, &c. or else they are Patents creating Persons *Barons*, or *per saltum Viscounts* or *Earls*, &c. who were perfect Commoners before. The reason of which Distinction is, that I think a great Difference is to be made between those Patents, which only grant to a Man who is already a *Peer* or *Baron*, an Advancement in the *Peerage*, and those which being made to mere Commoners are Introductory of new *Peerages*. For the Body of the *Peers* are manifestly much more concern'd in the last of these, than in the first.

It is so long since our Nobility has ceas'd to be Feudal, that the very Notion of an Officiary *Earl* is almost lost in *England*, tho' yet the Privileges of those Persons whose Titles are singly owing to their Patents, are founded upon the Constitution, as it was

fram'd and understood by their Feudal Predecessors. Now as *Dukes*, *Marquisses* and *Viscounts*, are but Modern Titles in Comparison of *Earls* and *Barons*, I shall chiefly consider, only the Patents by which the two last were created, since the Right of creating the others will naturally be determin'd by the same Rules and Methods of Proceeding, in which the Prerogative of making *Earls* and *Barons* was exercis'd. That an Earldom was Originally Officiary and Feudal (that is since the Conquest) is certain; and his Office by the Common Law was (as my Lord *Coke* says) to be the Great Conservator of the Peace in his County. And as *Baron* and *Barony*, so also were *Count* or *Earl*, and County not only Correlative Terms but Things, nor cou'd one properly subsist without the other. And while *Earldoms* were upon this Officiary Foot, as it highly concern'd the Inhabitants of their respective Counties, that they shou'd not too much depend upon the Prince, so their Fees or Salaries were not precarious nor deriv'd from the good Pleasure of the Crown, but consisted of the third part of the Profits of the Pleas, *&c.* of their Counties, to which by Common Law, and *qua Comites*, they were entitled. Nor was it an inconsiderable Sum in those Times, when as my Lord C. J. *Hales* observes, the Business of the County Courts was not substracted from them, but Fines were there levied, *Post fines, fines pro licencia concordandi, pro Inquisitionibus habendis*, &c. the Profits arising from all which, made part of the Sheriffs Term *de proficuis Comitatûs*. Before the Conquest, these Offices were at most but for term of Life, but by the Conqueror they were made Feudal and Hereditary, but without the Introduction of any other Difference; for the Office still continu'd the same, and if we consider the Extant Grants of Earldoms, that pass'd during a long Time after his Reign, we shall find that the *tertius denarius* was consider'd in Law, as it were Essential to the Dignity of an *Earl*.

Nevill's Case.

Hist. of the Law.

Earldoms and Baronies were by Intendment of Law (as is before observ'd out of the Mirror of Justices) establish'd for the Defence of the Realm; and the Feudal Nations had no more Notion, after they were form'd into a Civil Government, that a Kingdom could subsist without *Earls* and *Barons*, than they had while they were but the Body of an Army, that their Conquests

quests could be carried on, and a proper Discipline maintain'd among them, without General and other Subordinate Officers. And therefore when any *Earldoms* or *Baronies* escheated, the King had not only (as is above mention'd) a Right to grant them to other Persons, but was in all probability under the same Necessity and Obligation to do it, as while he was as yet consider'd but only as a General or Commander in Chief, he was under to fill up the vacant Commissions of Officers in his Army. But to return to our Officiary *Earldoms*; the King did not antiently grant *Nomen, Stylum & Titulum Comitis*, but *ipsum Comitatum*; by which Words the *tertius Denarius unde Comites erant* (as it is express'd in some old Charters) did pass by Operation of Law, without any express Words for the Grant of it. But here I think it may be observ'd, that there are but very few Patents (that is not above seventeen or eighteen) extant antecedent to the 11th of *Edw.* III. all of which are of Feudal Earldoms; for as yet the Creation of *Barons* by Patent had not been thought of, but the Livery of Lands, *&c.* held *per Baroniam*, and the receiving the Homage of the Tenant (which all together made a Ceremony something like the Modern *German* Investitures) was all that went to the making a *Baron*. The six first of these antient Patents, that is, from the Grant of the Empress *Maud* to *Geofroy de Magnavillâ* of the Earldom of *Essex*, unto the first of King *John*, have the *tertius Denarius* regularly inserted in them; and in particular, that of the Earldom of *Essex* has these remarkable Words, which make us know, beyond all possibility of Doubt, how the Law was understood in those times: "Ego Matildis, *&c.* —— Do & Concedo "Gaufredo de Magnavilla —— ut sit Comes de "Essexiâ, *& habeat tertium Denarium Vice-Comitatûs de "Placitis, sicut Comes habere debet in Comitatu suo*, &c." King *John* first introduc'd another Method of creating Earls, tho' yet he preserv'd them Officiary, the only Difference that he made relating wholly to the third part of the Profits of the Counties, which he thought too much to be granted away; and therefore some little Lawyer of that Age invented the Method of granting ten or twenty Pounds *percipiend' de tertio denario Comitatûs* in lieu of it, thereby reserving to himself all the other Profits of the County. Apud Sel.

But

But then it is remarkable, that in this Grant of King *John*, which was in the first Year of his Reign, to *Humphry de Bohun Earl of Hereford*, there is as it were a tacit Confession of its not being entirely Legal and and Regular; for the King (jealous lest the Law should adjudge his Grant of the Earldom to be good, and the Reservation of the Profits to himself void, and that the Earl might notwithstanding be entitled to, and claim the third Part of the Profits of his County) took collateral Security from the Earl, that he should never in the Right of his Earldom claim any thing more than the twenty Pounds expressly granted to him in the Patent, as appears from the following Words recited in the Preamble to it; "Et "ipse nobis Chartam suam fecit, quod ipse vel Hæ- "des sui nihil clamabunt unquam de nobis vel Hæ- "redibus nostris." All the rest of the Patents, during the before-mention'd time, are also Feudal and Officiary, and the *tertius Denarius* still granted in some; but by the others it may be observ'd, that the Example set by King *John* was thought fit to be imitated by his Successors: But yet after all, that could not well be consider'd otherwise than as a Slight of Law; for even after that time the Opinion of *Earl* and *Earldoms* being necessarily relative to one another, continu'd for some Ages in the World; and therefore the Grant of this Money (which at this Day is call'd Creation-Money) was in the old Grants so worded, as that it might, if possible, be consider'd in Law *sub ratione tertii Denarii*; for which Reason it was made payable out of that third part of the Profits of the County, which of Right ought to have belong'd to the *Earl*. This it was that made the *Comitalis Honor*; tho' sometimes the Patentees would, after that the *Earls* were stripp'd of their *tertius Denarius*, for the better Support of their Dignity, get their Lands to be annex'd to, and made parcel of it. Till the eleventh of *Edw.* III. this Money was almost constantly made payable out of the Profits of the County, of which the Patentee was made *Earl*; as in the Patent to *Robert de Ufford Earl of Suffolk*, his Grant of twenty Pounds is, "Percipiend' de Exitibus Comitat' predict' "*sub Nomine & Honore Comitis Suffolciæ*;" but since that time the Method (which at last has universally prevail'd) is to grant some small Annuity for the better

Rot. Ch. 1 Jo. p. 2. n. 177.

Rot. Ch. 11 Ed. 3. n. 52.

better Support of the Dignity, payable at the Exchequer. It would be endleſs to enumerate the various Forms, that have been us'd in the Creation of this ſort of Earls; but the Reader, who deſires to be more fully inform'd of it, may conſult the Learned Mr. *Selden*'s elaborate Treatiſe *of Titles of Honor*. Beſides, it muſt be obſerv'd, that the Method us'd in the Creation of the other *Earls*, *&c.* who were not ſo exactly Feudal, is much more to the purpoſe of what we are now ſpeaking.

It is a known Privilege of the *Lords*, that they are not tryable otherwiſe than by their *Peers*, but there is this remarkable Difference between their Tryal *per Pares* and that of Commoners, that they cannot challenge any of the Perſons by whom they are to be try'd; from whence it ſeems manifeſtly to follow, that every ſingle Lord is much more concern'd in Intereſt in the Creation of a new Peer, than he poſſibly could be in the Queſtion, whether an Honor could be ſurrendred, or not; and yet that Queſtion was reſolv'd by the Houſe in the Negative, upon Conſideration, that every Lord, and even the whole Kingdom, was concern'd in the Extinguiſhment by Surrender, Fine, *&c.* of every Lordſhip. The Admiſſion of all new Tenants in any common ordinary Manor was always tranſacted in the Preſence of the other Tenants of the Manor, who antiently had a Negative upon every Man who was propos'd by the Lord to be admitted; which is exactly conſonant even to the very Text of the Feudal Law, "Ad probandam novam Inveſtituram, ſemper Pares Curiæ ſunt neceſſarii; & ſi ſine eis facta ſit Inveſtitura, etiamſi Dominus confiteatur factam: Quia tamen ſine hac Solemnitate facta eſt, non valet, etiamſi probari poſſit per breve Teſtatum." The Reaſon of which was, that every Tenant of a Manor was in all Feudal Controverſies, between himſelf and any other Tenant of the ſame *Manor*, to be bound by the Judgment of the Tenants of the Manor, and therefore was it reaſonable, that he ſhould be conſulted in the Admiſſion of Perſons who were to be his Judges. How far any thing of this Nature may be apply'd to the Houſe of Lords, which is (as before is obſerv'd) the Great *Court Baron* of the Kingdom, I muſt leave to every Reader

Vid. Purbecke's Caſe.

Feud. lib. 2. tit. 32.

Reader himself to judge, after that he has perus'd what will further be added upon this Subject.

It is very common for antient Statutes to be in the 8 Report. Form of Patents; and in the Prince's Case, where this Matter is at large explain'd, it is resolv'd, that all Patents which pass the Great Seal, and are Exhibited *ac authenticate Parliamenti*, or *per ipsum Regem in Parliamento*, have the full Strength and Authority of Acts of Parliament: Now the Resolution of that Case being undoubtedly Law, I cannot but own my self to have been very much surpriz'd, when, upon Inspection of the various Creations of *Peers* that pass'd between the eleventh of *Edw.* III. and the first of *Henry* VII. I found them (I think) almost all (except some that were Grants of Escheated Feudal *Honors*, and even the most part of them were so also) to have been made and pass'd by the Authority of, and in full Parliament. I believe that upon this Occasion some of my Readers will be as much surpriz'd as I was; for which Reason therefore, and also that they may the better judge, in what manner this Prerogative of creating Peers by Patent was originally exercis'd, I shall mention some of the most remarkable Circumstances that I observ'd of several Patents that were pass'd in each Reign.

Rot. Ch. 11 Ed. 3, n. 34. In the eleventh of *Edward* III. *Henry* of *Lancaster* was made Earl of *Derby*, according to the express Words of the Patent, *de assensu dilli Parliamenti existen.*

Rot. Ch. 11 Ed. 3 m. 23. And in the same Year *William de Clynton* was made Earl of *Huntingdon*, *William de Bohun* Earl of *Northampton*, *Robert de Ufford* Earl of *Suffolk*, and *Edward* Prince of

n. 41, 49, 52, 60. *Cornwall*, all of them by Assent of Parliament; *de assensu & consilio Prælatorum, Comitum, Baronum & aliorum de Concilio nostro in præsenti Parliamento.*

It is remarkable of *Edward* III. that in order to strengthen his Interest, and carry on his Designs in *France*, he married his Daughter *Isabel* to a *French* Nobleman call'd the *Baron de Coucy*, (and had actually treated for the Marriage of another with the Son of the *de Albret.*) Now (after his Marriage) the King even apply'd to Parliament, to be enabled to make him a Peer of *England*, which could not be, because the Baron was a Foreigner, since he had a very large Estate in Land in *England*: But what makes this Case the more remarkable is, that the particular Consent of each single

Lord

Lord was added, as appears by the following Words of the Parliament-Roll, " ——— Les Prelatz, [illegible], Rot. Parl. " Counts, Barons, &c. esteantz en la chambre blanche 40 Ed. 3. " lurz devant eux mesmes les ordenances & affers, m. 13. " le Chanceller monstra a les Grantz & Communes, " coment le Roy avoit mariez sa fille Isabelle a Seig- " neur de Coucy, qi avoit Belles terres en Angle- " terre & aillours, & per cause il estoit si pres son al- " liee il serroit seant au Roy de luy —— nomer & " faire Counte, & estoit demande a eux lour avys & " assent ; Queux *Grantz chescun per soy*, & les Com- " muns de un' Assent, accorderent, *&c.* The *Baron* was afterwards made Earl of *Bedford*, but yet by the Rot. Ch. Patent which pass'd, it would be impossible to dis- 39 & 40 cover whether the Parliament had been consulted in L. 3. n. 12. it, or not. Upon which Account, and some other Instances of the like Nature, it may not be unreasonable to believe, that all the Patents of Earldoms, *&c.* were, during this Period of time, pass'd in Parliament, notwithstanding that there are some few Patents pass'd, in which the Parliament is not mention'd, since (if I am not mistaken) there are not above ten of those, to above one hundred of the other Sort ; and of those ten, not one during the long Reign of *Ed.* III.

In the Reign of *Richard* II. above thirty Persons were made Dukes or Earls, " *de Assensu Prælatorum*, " *Ducum, Comitum, Baronum & Communitatis Regni in* " *Parliamento* ; " and what is very remarkable, his Uncle, *Thomas* Earl of *Wodestoke*, who in the first Year of his Reign had been created Earl of *Bucks* without Parliament, in the 14th Year of his Reign, had a new Patent pass'd for the same Earldom, which is said in Rot. Ch. the Patent to be for the Security of his said Uncle ; 14 R. 2. " Nos *pro Securitate* ipsius Avunculi nostri Thomæ, *&c.* n. 5. " ac de assensu & consilio omnium Prælatorum, Mag- " natum & Procerum, *&c.* —— ac aliorum de consilio " nostro ——— necnon ad specialem requisitionem & " de assensu totius Communitatis ejusdem Regni no- " stri in Parliamento, *&c.*

In the Reign of *Henry* IV. there were but two Rot. Ch. Patents, of which one was to *Thomas of Beaufort*, his 13 & 14 Brother, creating him Earl of *Dorset*, the other to H. 4. p. 1. his Son *Thomas of Lancaster*, of the Earldom of *Mille-* n. 2, 3.

marle and Dutchy of *Clarence*; and therefore conſidering how near thoſe two Princes were related to the Crown, it is no ways ſurprizing, that the Conſent of Parliament is not particularly mention'd in the Patents. But here I would obſerve to the Reader, that when I mention any Patents wherein the Parliament is not mention'd, all that I can do is, not to *affirm* them to have been paſs'd in Parliament, ſince I muſt own that I think it more than probable, that they were alſo paſs'd; it often happening, that by the Parliament-Rolls it ſhall appear, many Patents were paſs'd in Parliament, in which however no Mention is made of the Parliament; ſo that if the Parliament-Roll ſhould happen to be loſt, it would be for ever impoſſible to ſhow, the Parliament was any ways concern'd in the paſſing them.

The braveſt of our Princes have always preſerv'd the beſt Underſtanding with their Parliaments, and therefore the Patents of Peerage, which were paſs'd by *Henry* V. (excepting only one Patent of Reſtitution to *Henry Piercy* Earl of *Northumberland*, and another of the Feudal County of *Richmond* to *John of Lancaſter*, "*Caſtri, Comitatûs, Honoris, & Dominii de Richemonde*") were all paſs'd in Parliament; as appears from the Entries upon the Rolls of Parliament, of which not to multiply Precedents, this is one Inſtance; "Item "fait aſſavori que noſtre treſſoverain Seigneur le "Roy, ſeiant en Parlement, en ſa ſe Royalle a la "requeſte des Seigneurs Spirituels & Temporels, & "de ſes Communes en meſme le Parlement aſſemblez, "creaſt & preſiſt Johan. de Lancaſtre, ſon Frere, en "Count de Kendale & Duc de Bedeford, & Humfry "de Lancaſtre, ſon autre Frere, en Count de Pem-"broke & Duc de Glouceſtre, *&c.*" But I cannot quit the Reign of *Henry* V. without obſerving, that this Paſſage out of the Rolls does in ſome meaſure juſtify what I have before ſaid (by way of Diſtinction) of *Feudal and Honorary Earldoms*; for it appears, that in the ſame Year in which *Henry* V. by *Parliament* created his Brother Duke of *Glouceſtre*, he without Parliament granted him the *Feudal County of Richemonde*.

Rot. Pat. 2 H. 5. p. 2. m. 2. Rot. Ch. 3 & 4 H. 5. n. 6.

Rot. Par. 2 H. 5. p. 1. n. 8. Rot. Pat. 2 H. 5. p. 1. m. 36. *&c.*

In the Reign of *Henry* VI likewiſe above twenty Patents for the Creation of *Dukes, Earls, &c.* were

paſs'd

pass'd in Parliament; and, as I before observ'd that many Patents appear by the Parliament-Rolls to have been pass'd in Parliament, in which no Mention of the Parliament is made, so here it must be observ'd, that upon the Patent-Rolls it appears, that many Patents were pass'd in Parliament, of which no Mention is made upon the extant Rolls of Parliament; both which being consider'd together seem to make it still more probable, that all Patents of this Nature were pass'd *de Authoritate Parliamenti*: I could mention a great Number of them, (was it necessary) which appear not upon the Parliament-Rolls, which yet are all subscrib'd, *per breve de privato sigillo & de data prædictâ authoritate Parliamenti.*

In *Edward* the fourth's Reign also, to conclude this Head, there are above a dozen Patents of this Nature, which by their Subscription appear to have been pass'd by Authority of Parliament; but what is something remarkable in this Reign is, that in one Patent, by which *John*, the King's Brother's Son, was created Earl of *Lincoln*, the Parliament not being concern'd in the Creation, a Clause of *non obstante* any Custom or Usage to the contrary (which Clause I take to be the first of the kind) is inserted into it. Rot Ch. 7 Ed. 4. n. 40.

From what has been now said in relation to the creating of Earldoms, *&c.* I think I need not go about to draw any Conclusions, but leave it to every Reader to judge what the natural Consequence is. Now if this was the Case in relation to Patents, by which an Advancement only in the *Peerage* was granted, it may well be expected, that the same Method was also observ'd in the creating of *Barons*, by which the Voters in the House of Lords were increas'd, and every particular Lord had a new *unchallengeable Judge* impos'd upon him. Nor does the Practice deceive our Expectation, for during all that time, that is, from the 49th of *Henry* III. unto the first of *Henry* VII. (whatever Exception there may be to the contrary as to Earldoms) there is not one Instance (unless the first be allow'd to be so) of a *Baron*'s being created by Patent otherwise than in Parliament: And indeed it seems reasonable that it should be so; for a *Barony* (as before is observ'd) was originally founded altogether upon *Realty*, and all the Dignity and Privileges of the Lords

were deriv'd from their being Tenants *per Baroniam*: What Ails therefore, than a Patent pass'd in Parliament, can make a Man, who was not a Tenant *per Baroniam*, be consider'd in Law as if he was; for such was the Effect and Operation of their *Patents*: And the Law, even unto this Day, notwithstanding that all *Baronial* Services, &c. are by Statute taken away, must in a great many Particulars be consider'd as such. But I forbear entring further into any Considerations of this Nature, and proceed to give an Account of those Patents that have been pass'd for the Creation of *Barons*, and the Reader will perhaps be again surpriz'd, when I tell him, that during all that time there were but fifteen Patents pass'd for that Purpose.

Rot. Pat. 11 Ric. 2. p. 1. m. 12. The first Person (as every Body knows) who was created a *Baron* by Patent, was *John de Beauchampe* in 11 *Rich.* II. but then it is remarkable, that he never sat in Parliament as a *Baron*: (tho' his Name is upon the Lists of Summons to Parliament in the Year of his Creation (for in that very Parliament he was attainted, as being one of the Accomplices of the Earl of *Suffolk*, and Duke of *Ireland*, &c. besides which it is also to be obser'v'd, that when his Patent pass'd, *Michael de la Pole* had the Keeping of the Great-Seal, and for that Reason his Patent could never have been allow'd in Parliament; for in the Parliament held in the preceding Year, the Great Seal had been taken away from *Michael de la Pole*, and he was declar'd incapable of ever having it again; and therefore one of the Articles against this *John de Beauchampe* was, that he had counsell'd the King, contrary to the Declaration of Parliament, to give the Seals again to him, *viz.* "Item, 11 Ric. 2. "Ja ou a Darrein Parlement ——— Michel de la "Pole pur diverses Causes deshonestes ——— feust "discharge del Office de Chancellor & le Grant Sele "le Roy feust pris de luy les dits (of which *John de* "*Beauchampe* is one) luy fist reavoir le Grant Sele——— "Quel feust Subversion de toute la ley du Royaulme, "*&c.*" This Patent therefore was no other than a vain Attempt for the Creation of a *Baron*, which never took Place; nor was he ever more summon'd to Parliament, but in some few Years afterwards executed. Another Reason also of the Animosity the Barons show'd against this *John de Beauchamp*, was, his being

being a Confederate with Sir *Nicholas Brembre*, Mayor of *London*, in whose Favour that weak Prince *Richard* the Second had intended to change the Name of the City, and to create him Duke of *New-Troy*. Hic si " Vixisset, (says *Henry de Knyghton*) Dux *Trojæ* per Re- Knighton " gem factus fuisset. Nam ab Antiquo Civitas Lon- inter de- " donienſis, *Troia minor* vocata est. Et sic Dux de cem Scr. " Londoniis esset mutato Nomine Londoniarum in p. 2727. " nomen *Trojæ*. ———

2. The second *Baron* who was created by Patent, was Sir *John Cornwall*, in whose Patent (for the first Time at least that I have seen) the Phrase of the three Rot. Pat. States of Parliament is us'd. " In trium statuum 11 H. 6. " ejusdem Parliamenti præsentiâ de gratiâ suâ speci- p. 1. m. 16. " ali & ex certâ scientiâ suâ ac de Advisamento & " consensu Ducis Glouceſter' & Cardinalis Winton' ac " cæterorum Dominorum Spiritualium & Tempora- " lium in Parliamento.

3. The third was Sir *Ralph Botiller*, who was cre- Rot. Pat. ated Baron of *Sudley*, " De advisamento concilii no- 29 H. 6. " stri, &c. and the Patent was pas's'd, ' Per breve de m. 29. " privato sigillo & de datâ prædict. authoritate Par- " liamenti.

4. In the Parliament Roll of the 29th of *Henry* the Rot. Parl. Sixth, there is a *Memorandum* of the King's having also 29 H. 6. created the above-mention'd Sir *John Cornwall*, Baron n. 10. of *Milbroke*, " De avisamento & Consensu Domino- " rum, &c. creavimus, &c. in *Baronem Indigenam* Reg- " ni sui Angliæ per nomen, &c. *Baronis* de Milbroke.

5. The fifth was in favour of *John Talbot*, Son of Rot. Cart. the Earl of *Salop* by *Margaret* his second Wife, eldest 21 & 22 Daughter and Co-heiress of *Richard* Earl of *Warwick*, H. 6. n. 23. by *Elizabeth* his Wife, the Daughter and Heir of *Margaret* (the Wife of *Thomas* Lord *Berkeley*) who was the Daughter and Heir of *Warin* Lord *Lisle*. The Patent is *per breve de privato sigillo & de Authoritate Parliamenti*, and is to this purpose. " Nos nedum Præmis- " sa—verumentiam qualitèr præfatus Warinus & om- " nes Anteceſſores sui ratione Dominii & Manerii " prædict. (*H. Kingeston Lisle in Com Berkes*) no- " men & Dignitatem Baronis & Domini de Lisle a tem- " pore quo Memoria hominum non existit, optinue- " runt & habuerunt, Ipse & omnes Succeſſores sui ab " eodem tempore per hujusmodi nomen loca & Sessi-

" ones

" ones & alias præeminentias in Parliamentis, & con-
" ciliis Regis ut ceteri Barones Regni Angliæ a toto
" tempore prædicto habuerunt & optinuerunt. ——
" Ne propter temporis prolixitatem aut Successionis
" variationem aliove modo de hujusmodi stylo, no-
" mine, & Dignitate dubitari possit. —— And then reciting that the said *Barony* or Manor of *Kingston Lisle*, was by the consent of his Mother in the possession of the said *John Talbot*, it follows, " Ad remo-
" vendum omnem Dubitationis scrupulum ipsum, *&c.*
" creamus, *&c.* It is to be observ'd that this *Barony* was altogether Feudal, and therefore (considering what has been before said) the reason why the Authority of Parliament was wanting in this Case may possibly be, that his Mother being then alive, the *Barony* was actually in her, and cou'd not be transferr'd to the Son otherwise than by Parliament.

Rot. 25 H. p. 2. 6. The sixth was Sir *John Beauchampe*, who by Patent was created *Baron Beauchampe of Bemyche*.

Rot. Pa 26 H. 6 p. 2. m 7. The seventh was Sir *John Stourton*, who was created *Baron Stourton*.

ibid. m. 23. 8. The eighth was Sir *Thomas Hoo*, by the Name of *Baron Hoo de Hastyng*.

ibid. m. Rot. Ca 28 H. 6. n. 35. 9. The ninth was Sir *Richard Wydeville*, by the Name of *Baron* and *Lord Ryvers*.

10. The tenth was Sir *Thomas Grey*, by the Name of *Baron* of *Richmond Grey*.

Rot. Pat. 28 H. 6. p. 1. m. 10. 11. The eleventh was Sir *Thomas Percy*, by the Style of *Baron of Egremont*.

Rot. Pat. 37 H. 6. p. 1. m. 20. 12. The twelfth was Sir *Richard Fenys*, who in the Right of his Wife *Johanna*, Daughter and Heir of *Thomas*, the eldest Son and Heir of the Lord *Dacre* is declar'd, *&c.* Lord *Dacre*.

Rot. Pat. 4 Ed. 4. p. 1. m. 17. 13. The thirteenth was Sir *Humphry Stafford*, by the Name of *Baron Southwyke*.

Rot. Pat. 5 Ed. 4. p. 1. m. 6. 14. The fourteenth was Sir *Walter Blount*, by the Name of Lord *Mountjoy*.

15 Ed. 4. 15. The fifteenth was Sir *Edward Grey*, who in the Right of his Wife, the Sister and Heir of the before-mention'd *John* Lord *Talbot*, was declar'd *Lord Lisle*.

I believe these are all the Patents for *Baronies* that were pass'd before the first of *Henry* the Seventh, and they are all pass'd *per breve de privato sigillo & de Authoritate Parliamenti*, and consequently had all of them

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the force of Acts of Parliament. It is likewise further to be obſerv'd, that in every one of theſe Patents (except two or three) there are Words which either expreſly, or by the ſtrongeſt Implication imply a Right to demand a Writ of Summons to all future Parliaments. Since the middle of the Reign of *Henry* the Eighth, a particular Clauſe has been conſtantly inſerted for this purpoſe, "Dictus A. B. & Hæredes, *&c.* " & eorum Quilibet habeat teneat & poſſideat ſedem, " locum, & Vocem in Parliamentis publicis Comitiis " & conſiliis noſtris, *&c.* inter alios *Barones*, ut *Baro-* " *nes Parlamentorum*, &c. The conſtant Uſe of this or the like Clauſe, which is almoſt as old as the creation of *Barons* by Patent itſelf, does in ſome meaſure juſtify what I before obſerv'd in relation to *Barons* by Tenure, *viz.* that tho' every Lord of Parliament was a *Baron*, yet every *Baron* was not a Lord of Parliament; but what further evinces that for ſome time even after *Henry* the Seventh, the Notion prevail'd, or rather ſtill continu'd, that a Seat in Parliament was perfectly diſtinct from *Barony*, is, that if a Man was by Patent created a *Baron* without a Clauſe in it, granting him a Seat and Voice in Parliament, he had not a Right to demand a Writ of Summons. At leaſt two ſuch *Barons* have been by Patent created, one by *Henry* the Eighth, by Name *Robert Curſon*, who had before been created a *Baron* of the Empire by the Emperor *Maximilian*, the other by King *James* the Firſt, whoſe Name was *Thomas Arundel*, and who likewiſe had been created a *Baron* of the Empire. Theſe two Gentlemen ſeem to have been pretty much in the Caſe of the above-mention'd *Barones Minores*; they were *Barons* to all Intents and Purpoſes, and wanted nothing but a Writ to make them Lords of Parliament.

I believe it no ways neceſſary to make any particular Remarks, upon the Patents of *Honor* that were paſs'd during the Reigns of *Henry* the Seventh and Eighth, *Edward* the Sixth, Queen *Mary* and Queen *Elizabeth*: Since every one knows that from the Reign of *Henry* the Seventh, the Crown has got ground in this reſpect, and gone on ſtill more and more to exerciſe the Prerogative of creating Peers. It is Notorious that in Parliament, each Branch of the Legiſlature are poſſeſs'd of what may be call'd *Peculiars*.

That

That is, that Laws of a particular Nature, do not regularly nor according to the eſtabliſh'd Courſe of Parliamentary Proceedings, take their Riſe or Commencement, but in one Houſe or the other, according to the Tendency of the *Bill* propoſed. Thus (for Inſtance) a Money Bill, a Bill for regulating Elections, &c. always begins in the Houſe of Commons, and on the other Hand, Bills relating particularly to the Peers, as for Inſtance, the now depending *Bill* of *Peerage*, &c. are as conſtantly begun in the Houſe of Lords. And Acts of Grace, general Pardon, &c. do with the ſame Regularity always receive their firſt beginning from the Crown. Which Method of Proceeding does in no wiſe abridge or limit the Power of refuſing the Bill propos'd, which is, and always muſt be in the other Branches of the Legiſlature. I have taken notice of theſe Particulars, becauſe from what has been before ſaid, upon the Subject of *Patents* for *Baronies*, conſtantly paſſing in Parliament, it ſeems not an unlikely Suppoſition, that during the Time thoſe Parliamentary Patents were the conſtant Uſage, that they were of the Nature of Acts of Grace, that is, that tho' they cou'd be propos'd but only by the King as the Fountain of Honor, yet the Lords had perhaps a Negative upon all Patents of that Nature, juſt as they now have upon all Acts of Grace. The Reader muſt judge how far the preſent Cuſtom of all Patents being firſt read in the Houſe of Lords, before the Patentees are admitted to Act as *Barons*, does ſeem to favour the Notion. But if the Lords ever had ſuch a Right, I own myſelf Ignorant of any Law by which they cou'd have loſt it. It is true however, that they have not for more than this hundred Years exercis'd it, and (with whatever Intention ſeveral Peers may poſſibly have been created) by their admitting of all new created Peers into their Houſe; they have conſented as a Body to their Peerage, and actually given them a Parliamentary Right and Title to their Honors.

The greateſt Change that ever happened in the Conſtitution of *England*, was in the Reign of *Henry* the Seventh. Nor is there any ſtronger Inſtance of the Truth of that Maxim, that *Power is really founded upon and Inſeparably follows Property*. For before the

Reign

Reign of that Prince, the Ballance of Power against the Crown was in the Lords, and it cannot be well disputed, but that the Crown had antiently, as unlimited a Power to erect *Burroughs*, as to create *Peers*. And therefore it is that until his Time, the Lords did not suffer the Prerogative of creating *Barons* to be exercis'd otherwise than in Parliament, tho' at the same Time they were not very unwilling the Crown shou'd create *Burroughs*, which the Commons had not always strength enough to hinder, and which by being frequently situated upon the Lands of the Lords, were no inconsiderable Increase of their Power. But since that Reign the Lords having been set at full Liberty to alienate their Estates, Power has with the Possession of Land shifted itself to the Commons, and accordingly they have been ever since the only formidable Curb upon the Crown. Until the End of Queen *Elizabeth*'s Reign, tho' the Prerogative of creating Peers still grew, yet, as it was not exercis'd in a manner any thing gross, it was not complain'd of; but *James* I. finish'd the Power of the Commons by parting with his Fee Farm Rents, Court of Wards, *&c.* Lords he created innumerable, and some Burroughs; but the Crown soon found it convenient to quit that Practice; and now the Commons (just as the Lords did with relation to *Peerages*, while the *Barons* were feudal) begin openly to dispute the Power of creating *Burroughs*; and I believe every Reader will agree, that if a Burrough was now to be erected, its Members would find it pretty hard to gain Admission into the House of Commons.

But to conclude this Inquiry, it must be observ'd, that in every Reign since that of *Ja.* I. there have unhappily been perpetual Disputes between the Crown and the People, concerning the Bounds of Liberty and Prerogative; and therefore to an impartial Considerer of the Constitution, it will seem reasonable in a Question, relating to the *Constitution as such*, to examine how it was understood before his Accession; a View of which, so far as it relates to the *Peerage*, I have endeavour'd as fully as I was able to present to the Reader: And as for what has happen'd since the Accession of *James* I. in relation to the numerous Creation of *Peers*, I shall only add, that it has been com-

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plain'd of in every Reign. It was an Article agains the Great Duke of *Buckingham*, the powerful Favourite of two Kings; and by several Proteſts in the Journal of the Houſe of Lords, during the Reign of *Charles* II it is manifeſt that the Increaſe of the Peerage was by them then thought a Grievance; and every Man remembers, that the laſt Inſtance of the Abuſe of this Prerogative was, by the now ſitting Houſe of Commons, made an Article of Impeachment againſt the preſent Earl of *Oxford*.

FINIS.